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Mr. James Wurm  
Assistant General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Effect of Tie Vote on Matter Before  
Civil Service Commission

Dear Mr. Wurm:

This letter is in response to your recent request for advice as to whether or not a tie vote denies a protest before the Civil Service Commission. The specific matter concerns protests relating to individual questions and the general content of examinations, including a request that the examinations be canceled in connection with regular civil service examinations for classes 3616 Library Technical Assistant I and 3618 Library Technical Assistant II.

Your request states that the protests were considered at a meeting when two commissioners were present and the result was a tie vote. A request for reconsideration of the matter was not timely filed.

Charter Section 3.500 (formerly Section 19) provides that each board and commission may prescribe reasonable rules and regulations for the conduct of its affairs. The Civil Service Commission has prescribed rules and regulations but the subject of a tie vote is not covered. Section 3.500 further provides that a quorum for the conduct of business shall consist of a majority of all the members of each board or commission and a majority vote shall mean a majority of all of the members of the board or commission.

Based upon the language of Charter Section 3.500, two members of the Civil Service Commission would constitute a quorum and two votes would be needed to constitute a majority. For any proposition before the Commission to receive an affirmative vote,



Mr. James Wurm

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two members of the Commission must vote for the proposition whether there are two or three Commissioners present. This has been a long standing practice of the Civil Service Commission.

The rule as stated in Mason's Legislative Manual, Section 503,(7), "When a quorum is present the general rule is that a proposition may be carried by a majority of those voting or by any number, greater than a majority, that may be required by law." Mason's Legislative Manual, Section 39,(1), states: "When in a deliberative body a certain mode of procedure has been adopted in any case it becomes a precedent for its government in every case thereafter of a similar character; thus in time a succession of precedents is adopted, forming together a regular system of procedure, known as parliamentary law, and which, when once established, is binding upon the body."

You are advised that the tie vote constituted a denial of the request.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



January 12, 1972

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Elmo E. Ferrari, President  
San Francisco Police Commission  
850 Bryant Street  
San Francisco, California 94103

Subject: Memorandum of Understanding Between  
the San Francisco Police Officers  
Association and the Police Commission

Dear Mr. Ferrari:

This is in reply to your letter requesting my opinion as to whether or not the recently executed memorandum referred to above comes within the purview of the Meyers-Milias-Brown Act, and if it is valid and binding upon the Police Commission.

Your letter indicates that it is your understanding that such memorandums may not be accomplished until a local public entity has passed an ordinance implementing the provisions of the Meyers-Milias-Brown Act and that an election be held to determine which employee group represents the employees of the Police Department.

Section 3505 of the Government Code (Meyers-Milias-Brown Act, hereinafter called Act) provides that the governing body of a public agency shall meet and confer with the representatives of recognized employee organizations to exchange information regarding matters within the scope of representation and endeavor to reach agreement on said matters.

Section 3501(b) of the Act defines a "recognized employee organization" as one which has been "formally acknowledged by the public agency as an employee organization that represents employees of the public agency."

Section 3507 of the Act provides that the local public agency may adopt reasonable rules and regulations, after consultation with employee organizations which provide for, inter alia, recognition of employee organizations. No mention is made





Elmo E. Ferrari

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of elections or any other method of determining which employee organization is "recognized" but only that such rules and regulations be reasonable.

The Board of Supervisors by Resolution 9-71, dated January 16, 1971, "recognized" both the San Francisco Police Officers Association and Officers for Justice for the purpose of meeting and conferring and entering into memorandums of understanding. At that time those were the only two employee organizations representing members of the Police Department.

Most jurisdictions in California which have adopted procedures for "recognition" have granted recognition and the concomitant right to meet and confer to only one employee organization within a certain unit to the exclusion of all other employee organizations. (City of Los Angeles, County of Los Angeles, San Mateo County, Sacramento County, Contra Costa County and the City of San Diego).

The City and County of San Francisco by Resolution 9-71, supra, has granted recognition and the right to meet and confer to both employee organizations which represent police officers. Both organizations are authorized to enter into memorandums of understanding.

The Act provides that a local public agency adopt reasonable rules and regulations to govern recognition of employee organizations and that the public agency must then meet and confer with them in an effort to reach an agreement.

It is my opinion that the procedures taken by the City and County of San Francisco to grant recognition to the employee organizations in question are reasonable under the circumstances and comply with the provisions of the Act. The important criteria is that recognition of employee organizations be made available and be reasonable rather than that the recognition procedure be a part of some comprehensive ordinance and be available only by an election procedure.

Resolution 9-71, supra, not only granted recognition to the San Francisco Police Officers Association but it also authorized the San Francisco Police Commission to meet and confer with the San Francisco Police Officers Association and enter into a memorandum of understanding regarding terms and conditions of employment.





Elmo E. Ferrari

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Pursuant to this resolution (as evidenced by Section 1 of the Memorandum of Understanding), the San Francisco Police Officers Association and the Police Commission, after rather lengthy negotiations, executed the memorandum on October 28, 1971; all members of the Police Commission affixing their signatures thereto.

Considering that the terms of the Act were complied with in granting recognition to the San Francisco Police Officers Association, that the commission was authorized to, and in fact did, meet and confer in good faith with the San Francisco Police Officers Association and that a Memorandum of Understanding was fully executed by both parties, it is my opinion that said memorandum is, to the extent the content agreed to is within the jurisdiction of the Police Commission, legally valid, binding and enforceable upon the parties signatory.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



January 17, 1972

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Mr. Bernard Orsi  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Charter Section 8.341 Dismissal Procedure; Civil Service Rule 56 Without Application; Municipal Railway Grievance Procedure, Application to Carmen

Dear Mr. Orsi:

Your predecessor, Mr. Harry Albert, Acting General Manager, Personnel, has recently asked for advice on the following questions:

- 1) Whether it is a proper defense for a Municipal Railway operator in an appeal from a Section 154 dismissal to charge that he had not been allowed a prior opportunity for a grievance hearing, and whether the Civil Service Commission has authority to reverse the action of the appointing officer solely on such grounds, and
- 2) Whether a Municipal Railway operator who is not a member of the Transport Workers Union of America, AFL-CIO, may be required by the management of the Railway to follow the grievance procedure established in the Memorandum of Agreement between the Public Utilities Commission and the Union, or whether such employee would be subject to the grievance procedure as prescribed in Rule 56 of the Civil Service Commission.

#### CONCLUSIONS

- 1) It is not a proper defense, or more properly, a ground of appeal from a Section 154 dismissal, to charge denial



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of prior opportunity for a grievance hearing, without more, and the Civil Service Commission may not reverse the appointing officer solely on such grounds.

2) Municipal Railway operators, raising grievances over proposed dismissals, must follow the grievance procedure provided in the memorandum of agreement irrespective of union membership and may not invoke the procedure prescribed in Rule 56 of the Civil Service Commission.

### DISCUSSION

The Public Utilities Commission and the Transport Workers Union of America, AFL-CIO and Local 250A, Transport Workers Union of America (hereinafter "Union") entered into a memorandum of agreement on December 3, 1968. The agreement recites that

"The Commission agrees that it will recognize and treat the Union as the basic employee organization with presently exclusive authority for group representation for platform employees and bus and coach operators and employees in related classifications, and as the exclusive representative for the presenting and processing of employee grievances of its members." (Art. I, first paragraph.)

This agreement sets out a four-step grievance procedure, and for the purposes of this discussion, defines "grievance" as follows:

"A 'grievance' is defined to be a complaint on the part of any employee or the Union . . . that an employee has been recommended for discipline without good cause, or that a disciplinary penalty proposed before invocation of the grievance procedure is not fair and equitable or related to the offense committed with due regard to the employee's records."

Note that the language is "recommended for discipline without good cause." From those words it is apparent that the function of the four steps of the grievance procedure is not to try the issue of guilt on the infractions charged, but whether or not there is good cause to invoke the disciplinary procedures of Charter section 8.341 (formerly § 154). That this conclusion is consistent with the purpose of adoption of the grievance





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procedure; i.e., to provide ancillary and supplementary procedural steps to the disciplinary hearing procedures under that Charter section is borne out by Article XVI, paragraph B (second paragraph of step four) of the memorandum of agreement which provides:

"The report shall contain a factual summary of the grievance or grievances, the evidence, and a recommended decision. The General Manager of Public Utilities shall exercise his discretion in accepting, modifying or rejecting the recommended decision."

Continuing along this theme, the memorandum of agreement also provides, in Article XVI, section C:

"Nothing contained in this procedure shall be construed to deny to any employee his rights under the law or under applicable civil service rules, regulations and practices, or to diminish the power and duties of the General Manager of Public Utilities, as prescribed in the Charter of the City and County of San Francisco."

The Municipal Railway grievance procedure was originally adopted by the Public Utilities Commission on September 20, 1966, (Res. 66-0764) pursuant to its power under Charter section 3.500(a) (formerly § 19(a)) to prescribe rules and regulations for the conduct and government of its officers and employees. The grievance procedure was carried verbatim into the memorandum of agreement of December 3, 1968.

If at step three, or step four, the recommended decision is that there is good cause for dismissal, the appointing officer may proceed under Charter section 8.341 to hold a public hearing, and depending on the evidence presented, to exonerate, suspend or dismiss the employee. In sum, the memorandum of agreement does not do what it cannot legally do; i.e., deprive the appointing officer of discretionary powers conferred on him by the Charter (Letter Opinion No. 71-28, May 10, 1971; Webster v. Board (1903) 140 Cal. 331). Nor does it deprive the employee of his rights under the Charter. He is entitled, if he is a permanent employee, to a public hearing before his appointing officer on dismissal charges or on suspensions in excess of five days, notwithstanding any previous rulings adverse to him under the grievance procedure.





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The issue before the appointing officer at such a hearing is the truth or falsity of the charges for dismissal. This issue must be resolved by the appointing officer on the record made before him pursuant to fundamental procedural requirements (City Attorney's Opinions No. 1056, March 23, 1956, and No. 64-11, June 10, 1964; Steen v. Board (1945) 26 C.2d 716; and LaPrade v. Department of W. & P. (1945) 27 C.2d 47). Fundamental procedural requirements are that a decision of dismissal must be based on competent and relevant evidence to support the charges; i.e., testimony of witnesses subject to cross-examination, documentary evidence properly identified and authenticated, and observance of the employee's right to be heard in his own defense, to be represented, and to produce competent and relevant testimony and other evidence in his own behalf. If the appointing officer attempted to base a dismissal solely on the report of a step three or step four grievance hearing official, then the conduct of the grievance procedure would be material, except that an overriding objection would be that such a report is hearsay, and if the dismissal was based solely on hearsay, a ground for reversal, or for taking further evidence, would be present.

As stated previously, the power granted by Charter to the appointing officer to decide a dismissal case on competent evidence cannot be delegated. A ruling that improper conduct of the grievance procedure nullifies an otherwise proper decision of the appointing officer would amount to an improper delegation or abrogation of the discretion vested in the appointing officer.

Denial of a prior opportunity for a grievance hearing in itself is therefore not a proper ground of appeal from a Charter section 8.341 dismissal hearing. If the employee raised the denial of prior opportunity for a grievance hearing at an appointing officer's dismissal hearing, he would have to also show that such denial prejudiced his right to a fair hearing before the appointing officer, so that if any basis for prejudice did exist, it could be remedied at that hearing.

Assuming that an appointing officer dismisses a permanent employee, then the following portion of Charter section 8.341 comes into play:

" . . . The finding of the appointing officer shall be final, unless within thirty days therefrom the dismissed employee appeals to the Civil Service Commission. The appeal and all proceedings shall



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be in writing and shall briefly state the grounds therefor. The Civil Service Commission shall examine into the case and may require the appointing officer to furnish a record of the hearing and may require in writing any additional evidence it deems material, and may, thereupon, make such decision as it deems just. . . ."

The authority to require, in writing, any additional evidence it deems material is limited to competent evidence and does not authorize the admission of evidence which cannot be admitted on the trial itself, such as unsworn letters (Scannell v. Wolff (1948) 86 Cal.App.2d 489). The issue on appeal is whether the decision of the appointing officer to dismiss the employee is supported by competent evidence. The Civil Service Commission, in its discretion, may also decide that the charges are supported by the evidence, but that the employee should be suspended rather than dismissed.

The Charter provision leaves it to the commission to decide the materiality of additional evidence, and the commission has adopted a rule applicable to dismissal hearings on the nature of evidence it deems material. That rule reads, in part, as follows:

" . . . Such appeal must be in writing in the form provided by the Civil Service Commission, and must briefly and clearly state the reasons upon which it is based. Appeal may be entertained upon any of the following grounds:

- "(a) That the dismissal was made upon cause not covered by section 154 of the Charter;
- "(b) That the evidence was insufficient to support the charges;
- "(c) That evidence has been discovered, which the employee did not have an opportunity to present at the hearing of the charges, and which, if heard, would probably have produced a different decision. (Such new evidence must be stated in substance, and names and addresses of new witnesses given.)" (§ 3, rule 29, Rules of the Civil Service Commission.)





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By adoption of this rule the commission has clearly recognized its nature as an appellate body on charges of dismissal, and has confined its review to those matters relating to the grounds for dismissal or suspension and has excluded review of collateral matters not directly bearing on the evidence and proof of the grounds for discipline. The commission may change its rules upon one week's notice, but such changes cannot affect a case pending before the commission. (Charter § 3.661(a), formerly § 141.)

It is therefore not a proper ground for appeal from a section 8.341 dismissal to charge a denial of a prior opportunity for a grievance hearing, without more, and the Civil Service Commission does not have authority to reverse the action of the appointing officer solely on such grounds. If the ground of appeal alleges that there was a denial of a prior opportunity of a grievance hearing, and that such denial prejudiced the opportunity for a fair hearing before the appointing officer, and the record shows that the issue was raised before the appointing officer, then the commission would have the power to consider the matter on appeal.

Relative to your second question, rule 56 of the Civil Service Commission provides, in paragraph "G", as follows:

"G. Where an organized group of employees, who have exclusive recognition for a group of employees within a department, have signed a written memorandum of agreement with a board, commission or appointing officer, providing for a group grievance procedure, then such group grievances will be in accord with the written memorandum of agreement and not with the procedures set forth herein. A copy of such written memorandum of agreement shall be filed in the office of the Civil Service Commission."

This rule was adopted by the Civil Service Commission on March 10, 1969. The quoted language recognizes the memorandum of agreement entered into previously by the Public Utilities Commission and the Transport Workers Union, for the memorandum of agreement provides for a group grievance procedure, and that union is expressly recognized "as the basic employee organization with presently exclusive authority for group representation for platform employees and bus and coach operators and employees in related classifications."



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The memorandum of agreement also designates the Transport Workers Union as the "exclusive representative for the presenting and processing of employee grievances of its members." The legality of that statement depends upon the willingness of the members to be so represented. If the member (or the nonmember employee) does not wish to be so represented he can choose his own representative (Gov. C. 3502 and 3503),<sup>1</sup> but he must follow the grievance procedure prescribed for platform employees, if he uses the grievance procedure at all.

There is further difficulty with Civil Service Rule 56. It is not clear from the broad definition of "grievance" in section IIA, that preferring of charges for dismissal or suspension by the appointing officer against an employee is a grievance subject to the procedure, particularly when read in connection with the rest of the rule and the Charter. "Grievance" is defined as follows:

"A grievance shall be considered as any dispute, complaint, problem, issue or question arising with respect to conditions of employment or employer-employee relations of any nature or kind whatsoever within the authority of an appointing officer to act, and may be raised by an employee as to his specific grievance, by his representative as herein provided, or by an employee organization as to general matters. In the event of a dispute as to 'authority of an appointing officer to act,' the appointing officer shall request the advice of the City Attorney who shall respond within ten working days. The appointing officer shall provide a copy of the City Attorney's opinion to the grievant."

The grievance procedure reaches the appointing officer at step four, who reviews and discusses it with all parties in the following language:

---

1.

Chapter 1575, Statutes of 1971, which will become operative on March 4, 1972, authorizes public agencies to adopt rules and regulations including provisions for, inter alia, exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself as provided in Gov. Code sec. 3502.





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"a) If the grievance is not resolved in Step 3, the employee and/or his representative, shall use the same employee grievance form to submit the grievance to the appointing officer within seven working days after the date of notification of the decision by the intermediate supervisor.

"b) After review and discussion with all involved parties, the appointing officer shall use the grievance form to notify the employee of his decision and the reasons. This form shall be returned to the employee within seven working days of receipt of the grievance."

The decision of the appointing officer is appealable to the Employee Grievance Appeals Committee. After that body has considered the appeal it makes its recommendation back to the appointing officer who disposes of it under the following language:

"a) Upon receipt of the committee's recommendation, the appointing officer shall make a final decision in the matter and notify in writing all parties concerned within five working days of receipt of the committee's recommendation. If the appointing officer does not accept the committee's recommendation, he shall fully set forth in writing his reasons for such non-acceptance, a copy of which shall be sent to the Civil Service Commission."

There is no provision that the appointing officer, under Charter section 8.341, "shall publicly hear and determine the charges," nor that the "finding of the appointing officer shall be final. . . ." unless the employee appeals to the Civil Service Commission within thirty days. Nor does the language that if the appointing officer does not accept the committee's recommendation, he shall fully set forth in writing his reasons for such non-acceptance, a copy of which shall be sent to the Civil Service Commission, appear to comply with the language of Charter section 8.341, to the effect that the appointing officer shall furnish a record of the hearing to the commission.

Discretionary powers conferred by the Charter on the appointing officer cannot be delegated to others (supra), nor can the right to a public hearing on dismissal charges before



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the appointing officer and subsequent appeal to the Civil Service Commission be taken away by commission rule, for the appointing officer and the commission must act under the civil service provisions of the Charter in disciplining and removing employees (Charter § 3.501, formerly § 20; Hanley v. Murphy (1953) 40 Cal.2d 572, 577).

Thus, rule 56 of the Civil Service Commission has no application to dismissal charges under Charter section 8.341, and, accordingly, a Municipal Railway platform man or coach or bus operator charged with an offense for which dismissal proceedings are invoked may not have recourse to the grievance procedure under rule 56, irrespective of membership in the Transport Workers Union or his desire to be represented by someone else.

Your file will be returned under separate cover.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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100-100000

The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, for the period January 1, 1964, to January 31, 1964. The information was obtained from the records of the Department of the Interior, Bureau of Land Management, for the period January 1, 1964, to January 31, 1964.

There were 10,000 acres of land in the State of California, which were owned by the State of California, and which were not owned by the United States. The land was owned by the State of California, and was not owned by the United States.

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January 19, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: File No. 442-71; Power of Board of  
Supervisors to Review Master Plan for  
Waterfront Development; Power of Port  
Commission to Institute Legal Actions  
and to Employ Special Counsel to  
Prosecute Same

Dear Mr. Dolan:

This is in reply to your recent letter wherein you advise that the Planning and Development Committee has requested my advice as to how the Board of Supervisors could have some review and authority over the joint study presently being conducted by the City Planning Commission and the Port Commission to provide a master plan for waterfront development before it is incorporated into the Master Plan. The committee has also requested my advice as to the authority of the Port Commission to institute legal proceedings against the Bay Conservation and Development Commission; why the services of the City Attorney's office were not employed in such proceedings, and whether or not the Board of Supervisors should have been consulted prior to prosecution of this action.

With respect to your first request, Sections 3.524 and 3.525 of the Charter vest in the City Planning Commission the function and duty to adopt and maintain a comprehensive, long-term, general plan for the improvement and future development of the City and County, to be known as the Master Plan, and to amend the same to include at any time modifications and extensions thereof. In the preparation of any amendment to the Master Plan, the Department of City Planning is authorized to make or cause to be made such investigations, studies, maps, charts, exhibits and reports as it deems to be required. Before the City Planning Commission may adopt any substantial amendment or



Mr. Robert J. Dolan

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addition to the Master Plan which in the judgment of said commission constitutes a major alteration in the plan, it is required to hold at least one public hearing thereon, notice of the time and place of which shall be given by at least one publication in the official newspaper of the City and County not less than twenty days before the day of hearing.

In view of the foregoing it is my opinion that it would be necessary to amend the Charter in order to give the Board of Supervisors some review and authority over proposed amendments or additions to the Master Plan before their inclusion therein.

With respect to your second request, Section 3.585 of the Charter provides that the City Attorney shall be the legal adviser of the Port Commission but does authorize the Port Commission, with the consent of the Mayor and the approval of the City Attorney, to appoint special counsel. Section 3.401 of the Charter provides that the City Attorney shall commence legal proceedings whenever he has knowledge of a cause of action in favor of the City and County or when he is directed to do so by the Board of Supervisors. In the present instance the Bay Conservation and Development Commission, between 1969 and mid-1970, had repeatedly assured the Port of San Francisco that the construction of office and commercial facilities on replacement platforms for existing piers on the northern San Francisco waterfront would be permissible. In late 1970, following an opinion by the Attorney General that the Bay Conservation and Development Commission did not have authority to permit such construction, the commission reversed its position with respect to such proposed construction. The Port Commission, believing that a cause of action exists in favor of the City and County, requested and received the consent of the Mayor and the approval of the City Attorney to appoint special counsel to prosecute this action, pursuant to the provisions of Section 3.585 of the Charter.

Accordingly, the authority of the Port Commission to institute the instant lawsuit stems from the fact that a cause of action exists in favor of the City and County. In view of the fact that the prosecution of this involved, complex and extremely important litigation would seriously tax the staff of this office, it was decided that the Port Commission appoint special counsel to handle the matter. Finally, consultation was not had with the Board of Supervisors prior to prosecution of this action since such consultation is not provided for or required by the Charter.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





February 1, 1972

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Mr. Alfred Goldberg, Superintendent  
Bureau of Building Inspection  
450 McAllister Street  
San Francisco, California 94102

Subject: Building Code Sections 203.M and 203.0

Dear Mr. Goldberg:

In your letter of January 11, 1972, you requested an opinion as to whether the \$1,000 limit of Building Code Section 203.0 is meant to apply to work done under Section 203.M. It is my opinion that the \$1,000 limit does not apply.

In appropriate cases the Director, by the powers given to him under Section 203.M, may cause a building to be repaired or altered so as to render it safe with applicable laws and ordinances. If the Director does the work or causes the work to be done, he must first comply with the provisions of Section 203.N, which generally require the Director to notify the owner of the intention to do the work and set a date for taking bids. The date for taking bids must be no sooner than ten days from notice to the owner.

The cost of the work is to be paid by the "Repair and Demolition Fund" (§ 203.K) and there appears to be no monetary limit on the expenditures per unit. Since the fund is intended to replenish itself (§ 203.0) it would appear that the amount of the work and hence the lien amount should not exceed the figure that can be recovered by the lien process.

Work done under Section 203.0 is for the purpose of eliminating serious and immediate hazards that require prompt action to protect the occupants. In these cases, the Director is required to give 48 hours' notice and need not seek bids. The total value of the work under this section, however, is limited to 40 per cent of the assessed value but not to exceed \$1,000.



Mr. Alfred Goldberg

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February 1, 1972

This limit does not apply where the Director finds that the hazards threaten the public safety. Section 203.0 contemplates work done under different circumstances than those of 203.M and different rules of procedure apply. In my opinion, the \$1,000 limit in Section 203.0 applies exclusively to work done to eliminate immediate hazards where bids are not required and where the public safety is not threatened. The Director has the authority to do or cause to be done work in excess of \$1,000 under Section 203.M. The Director also has the discretion to determine when, if, or under what circumstances, and to what extent work will be done.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 16, 1972

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Mr. Emmery Mihaly  
Registrar of Voters  
155 City Hall  
San Francisco, California 94102

Subject: Spanish Translation of Candidate's  
Statement of Qualifications

Dear Mr. Mihaly:

This is in reply to your letter requesting my opinion as to whether or not the City and County of San Francisco must, pursuant to Chapter 1298, Statutes 1971, provide a Spanish translation of "Statement of Qualifications" if requested so to do, collect from the candidate the necessary cost of such translation if provided, and if said translation may be accomplished by the City and County without a Charter amendment.

Assembly Bill No. 2577, Chapter 1298, Statutes 1971, amends Section 10012.5 of the California Elections Code in pertinent part as follows:

" . . . The clerk shall provide a Spanish translation to those candidates who wish to have one, and shall select a person to provide such translation from the list of approved Spanish language translators and interpreters of the superior court of the county or from an institution accredited by the Western Association of Schools and Colleges.

"The local agency may bill each candidate availing himself of these services a sum not greater than the actual prorated costs of printing, handling, and translating, if any incurred by the agency as a result of providing this service. Only those charges may be levied and each candidate using these services shall be charged the same."





Mr. Emmerly Mihaly

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February 16, 1972

Section 9.103 of the Charter (formerly § 174) states in part as follows:

"All provisions of the general laws of this state, including penal laws, respecting the registration of voters, initiative, referendum and recall petitions, elections, canvass of returns and all matters pertinent to any and all of these, shall be applicable to the city and county except as otherwise provided by this charter or by ordinance adopted by the board of supervisors as authorized by this charter relative to any rights, powers or duties of the city and county or its officers. When not prohibited by general law, the supervisors by ordinance may provide that the publication of precincts and polling places shall be by posting only." (Emphasis added.)

Article XI, Sections 4 and 5 of the California Constitution empower cities and counties to include in their charters provisions for the election of officers and the conduct of city elections. Section 4 also states in subsection (g) as follows:

"Whenever any county has framed and adopted a charter, and the same shall have been approved by the Legislature as herein provided, the general laws adopted by the Legislature in pursuance of Section 1(b) of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, and for which provision is made therein . . ." (Emphasis added.)

Section 9.105 of the Charter (formerly § 176) states:

"The registrar shall, before each municipal election, cause to be printed in pamphlet form and mailed to each registered voter with the sample ballot, a copy of all statements of qualifications of candidates received by him, to be followed by the names and addresses and occupations of all sponsors of all officers to be voted for in said city and county." (Emphasis added.)



Mr. Emmery Mihaly

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February 16, 1972

In Mackey v. Thiel (1968) 68 Cal.Rptr. 717, the City of Los Angeles, pursuant to the powers invested in it by Article XI, Section 8-1/2 of the California Constitution had adopted a comprehensive elections code which did not include the sending out of statements of qualifications as provided for in Section 10012.5 of the Elections Code of the state. (§ 8-1/2 of art. XI has since been repealed and the substance of the language previously contained in § 8-1/2 is now found in §§ 4 and 5 supra.)

The District Court of Appeal in reversing the lower court found that the conduct of municipal elections was a municipal affair and subject to municipal control. The court also determined that a state statute which required the sending out of statements of qualifications was not binding upon a chartered city which had adopted a comprehensive elections code which did not include a provision for sending out said statements.

San Francisco, pursuant to the power invested in it by the State Constitution has adopted a comprehensive "elections code." (See art. IX, §§ 9.100 through 9.115 of the Charter of the City and County of San Francisco.) The election provisions do provide for the sending out of "Statement of Qualifications" but does not include any provision that the "Statement" be translated into Spanish, if so requested.

As is stated in Article XI, Section 5(b) of the State Constitution and pointed out in Mackey v. Thiel, supra, at page 719, "plenary authority is hereby granted . . . to provide therein or by amendment thereto, the manner in which the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed . . ."

Based upon the above, it is my opinion that the provisions found in Chapter 1298, Statutes 1971, relating to Spanish interpretation of Statements of Qualifications are not binding upon the City and County of San Francisco and that if the Registrar of Voters is requested to provide such interpretation should, without local legislation providing for same, refuse to honor such a request.

As is set forth above in Section 9.103 of the Charter, the general law of the state will be applicable "except as otherwise provided by this charter or by ordinance adopted by the board of supervisors as authorized by this charter relative to any rights, powers or duties of the city and county or its officers."





Mr. Emmery Mihaly

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February 16, 1972

Reading this provision in conjunction with Section 2.101 of the Charter relating to the powers of the Board of Supervisors it is my opinion that the Board of Supervisors could enact an ordinance requiring the Registrar of Voters to provide a Spanish translation of Statements of Qualification but such legislation could not, of course, conflict with any of the election provisions presently existing in the Charter.

The payment for the costs incurred in providing a Spanish translation of a Statement of Qualifications (assuming the adoption of local legislation) could also be covered in an ordinance passed by the Board of Supervisors and, therefore, while the providing of a Spanish translation and the collection of costs incurred are not applicable to the City and County of San Francisco both aspects could become a part of the municipal election process without the necessity of a Charter amendment.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





February 7, 1972

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Mr. S. M. Tatarian, Director  
Department of Public Works  
260 City Hall  
San Francisco, California 94102

Subject: Applicability of Hotel License Fees  
to Rectories, Convents and Monasteries

Dear Mr. Tatarian:

This is in response to your request as to whether rectories, convents and monasteries should be subject to license fees as hotels.

The license fees for hotels are imposed pursuant to the provisions of Section 160, Part III, of the San Francisco Municipal Code (License Code) which require that every person, firm, partnership or corporation maintaining, conducting or operating a hotel shall pay an annual license fee and that no permit shall be issued therefor without said license first having been had and obtained. For the purposes of the section a hotel is defined as follows:

" . . . For the purpose of this section a hotel shall be deemed to be any building or portion thereof, containing six (6) or more guest rooms used or intended or designed to be used, let or hired out to be occupied or which are occupied by six (6) or more guests, whether the compensation for hire be paid directly or indirectly in money, goods, wares, merchandise, labor or otherwise, and shall include hotels, motels, public and private clubs, and any such building of any nature whatsoever so occupied, designed, or intended to be occupied, except jails, hospitals, asylums, sanitariums, orphanages, prisons, detention and similar buildings where human beings are housed and detained under legal restraint. . . ."



Mr. S. M. Tatarian

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February 7, 1972

The following definitions appear in the section for "Guest Room" and "Guests."

" . . . 'Guest Room' is a room which is occupied or is intended, arranged or designed to be occupied for sleeping purposes by one (1) or more guests, but shall not be deemed to include dormitories used for sleeping purposes. . . ."

" . . . 'Guest' is any person hiring and occupying a room for sleeping purposes and shall include both boarders and lodgers. . . ."

In the ordinary understanding of the term and it follows from the above definitions that a hotel is a business operation where rooms for sleeping purposes are hired for a compensation. The subject licensed and taxed is not the building itself but the hotel business operation conducted therein. Although rectories, convents and monasteries are used for sleeping purposes by those who have devoted their life to their religious vocation, the activities conducted in such buildings and the purposes of their construction bear not the slightest resemblance to a hotel purpose or operation.

A monastery is a place where there is conducted a phase of religious dedication consisting in part of communal living, meditation, prayer, study and religious services conducted in a chapel on the premises. The same is true of the activity conducted in cloistered convents and also in noncloistered convents but to a lesser degree. A rectory or parish house is an integral part of the Church and the parish it serves. It is in this building that the entire administration of the parish and the parish church is conducted. This includes all financial arrangements, arrangements for administration of the particular church sacraments, personal spiritual guidance and instruction, instruction on the particular religion, meetings and other religious activities. To impose a license requirement and a license fee or tax on the operation of these buildings would be to impose the requirement of a license and a fee or tax for the conduct of religious activities. Accordingly, if Section 160 were to be construed as applying to rectories, convents and monasteries, the question of the impairment of religious freedoms guaranteed by the First and Fourteenth Amendments of the United States Constitution and Section 4 of Article I of the California Constitution would be squarely in issue. (See: Murdock v. Pennsylvania, 319 U.S. 105, 87 L.Ed. 1292.) However, the constitutional issue





Mr. S. M. Tatarian

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February 7, 1972

need not be reached as Section 160 of the License Code does not specifically purport to, nor does it by its general terms apply to rectories, convents and monasteries. It is to be noted that one of the basic components of the definition of a "hotel" and of a "guest" contained in Section 160 is the hiring of a room for compensation. The residents of rectories, convents and monasteries are not guests within this definition and do not hire rooms for compensation as they are assigned by their superiors to these particular places for the pursuit of their particular religious vocations and activities. It is further to be observed that when it has been the intent of the legislative body to apply a regulation to rectories, convents and monasteries, such places have been specifically named in the regulation. Thus, for example, the Building Code defines Group H Occupancy as follows:

"SEC. 1301. Group H Occupancies Defined.

Group H Occupancies shall be: hotels, motels and apartment houses; convents, monasteries and rectories each containing 6 or more sleeping rooms; dormitories with more than 6 persons in the building. Nursing homes not exceeding 6 persons shall be considered as Group I occupancies."

The differentiation in Section 1301 between rectories, convents and monasteries and hotels is carried out throughout the article in which Section 1301 is a part as certain regulations therein are made to apply specifically to apartment houses, or to hotels, or to apartment houses and hotels and others are made to apply to all Group H occupancies.

You are accordingly advised that it is my opinion that rectories, convents and monasteries are not subject to license fees as hotels under the provisions of Section 160 of Part III of the San Francisco Municipal Code.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





February 14, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Jurisdiction of Board of Supervisors  
to Sit as Board of Equalization When  
Immunity from Taxation is in Issue

Dear Mr. Dolan:

This is in response to your letter to me forwarding the request of the Finance Committee of the Board of Supervisors for my opinion as to whether or not the Board of Supervisors had jurisdiction to consider property tax refund claims which raise immunity issues, notwithstanding that an Assessment Appeals Board has been created in the City and County of San Francisco.

In 1962, when special equalization boards first were authorized, all administrative remedies relating to property tax assessments (outside of the assessor's office itself) were within the jurisdiction of the County Board of Supervisors.

If the property tax protest was within the purview of the California Constitution, Art. XIII, Section 9,\*the matter was

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" . . . The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided, such . . . county boards of equalization are hereby authorized and empowered, . . . to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll;  
. . . "



Mr. Robert J. Dolan

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heard by the County Board of Supervisors sitting as a board of equalization in accordance with Revenue and Taxation Code Sections 1601-1620.

If the property tax protest was not within the jurisdiction of the board of equalization as above described, the taxpayer was entitled to seek relief from the courts without having filed a petition with the board of equalization, provided that the taxes were paid under protest pursuant to Revenue and Taxation Code Sections 5136-5143, and particularly Section 5137: Parrott & Co. v. City and County of San Francisco (1955) 131 C.A.2d 332; Star-Kist Foods v. Quinn (1960) 54 Cal.2d 507; Parr-Richmond Industrial Corp. v. Boyd (1954) 43 Cal.2d 157; San Diego T & S Bank v. County of San Diego (1940) 16 Cal.2d 142; Bank of America v. County of Los Angeles (1964) 224 C.A.2d 108. Additionally, if the taxpayer chose to do so, he was entitled to pursue the administrative remedy of a claim for refund on the theory that the taxes were erroneously or illegally collected in accordance with former Art. XIII, Section 10 (now Art. XIII, § 12) of the California Constitution, as implemented by Revenue and Taxation Code Sections 5096-5107, El Tejon Cattle Co. v. County of San Diego (1967) 252 C.A.2d 441. Such a claim for refund was considered by the County Board of Supervisors, but not in its capacity as a county board of equalization. The claim for refund procedure is available only when the assessment is totally void. It is not an adequate substitute for a petition to the board of equalization if the matter properly was within the jurisdiction of the board of equalization. Montgomery Ward & Co. v. Welch (1936) 17 C.A.2d 127; Stenocord Corp. v. City and County of San Francisco (1970) 5 C.3d 984.

Questions naturally arose as to whether or not a particular property tax dispute was within the function of the board of equalization. As stated in Star-Kist Foods v. Quinn (1960) 54 C.2d 507 at 510:

"The necessity of recourse to the board (of equalization) is properly determined by the nature of the issues in dispute. . . ."

The general rules, as most recently stated in Stenocord Corp. v. City and County of San Francisco (1970) 2 C.3d 984, are and were, as follows:

"Ordinarily a taxpayer seeking relief from an erroneous assessment must exhaust

CHICAGO, ILL., JANUARY 10, 1910

DEAR MR. [Name],

I have just received your letter of the 8th inst. regarding the [Subject] and am glad to hear that you are interested in the [Subject].

I am sorry that I cannot give you a more definite answer at this time, but the [Subject] is a very complex one and requires a great deal of further investigation. I am sure, however, that the [Subject] is of great importance and that your interest in it is well founded.

I am sure that you will find the [Subject] very interesting and that you will be able to make some valuable contributions to the [Subject].

I am sure that you will find the [Subject] very interesting and that you will be able to make some valuable contributions to the [Subject].

I am sure that you will find the [Subject] very interesting and that you will be able to make some valuable contributions to the [Subject].



Mr. Robert J. Dolan

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available administrative remedies before resorting to the courts. (Citations) An exception is made when the assessment is a nullity as a matter of law because, for example, the property is tax exempt, nonexistent or outside the jurisdiction (citations) and no factual questions exist regarding the valuation of the property which, upon review by the board of equalization, might be resolved in the taxpayer's favor, thereby making further litigation unnecessary (citations).

\* \* \*

"The fact that the assessor erroneously over-values property which is otherwise subject to tax does not render the assessment a nullity under the foregoing rule, for disputes regarding valuation are within the special competence of the board of equalization. (Citations) If any question of valuation exists, it would be irrelevant that plaintiff also challenges the assessment as 'arbitrary' or void on constitutional grounds. (Citations) If prior recourse to the board on the question of valuation might have avoided the necessity of deciding the constitutional issue, or modified its nature, plaintiff's action was properly dismissed.

\* \* \*

"Plaintiff contends that the filing of its refund claim with the board of supervisors satisfied the requirement that it exhaust its administrative remedies. However, a claim for refund is an adequate substitute for a request for equalization only in those cases wherein the assessment is totally void as an attempt to tax property not subject to taxation, rather than merely an inaccurate assessment of the value of taxable property." (Citations)

Under these general principles, the assessee as a general rule was required to exhaust his administrative remedies before the county board of equalization which, as to valuation or equalization questions, was deemed to have special competence.





Mr. Robert J. Dolan

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Hence, the county board of equalization had exclusive original jurisdiction whenever the property tax protest, in whole or in part, involved the following matters, among others: where the assessee claimed that the assessor had overvalued his property, Luce v. City of San Diego (1926) 198 Cal. 405; Montgomery Ward & Co. v. Welch (1936) 17 C.A.2d 127; Hunt-Wesson Foods, Inc. v. County of Stanislaus (1969) 273 C.A.2d 92; where the assessee claimed that the assessor had utilized an incorrect assessment ratio, Virtue Bros. v. County of Los Angeles (1966) 239 C.A.2d 220; Dawson v. County of Los Angeles (1940) 15 Cal.2d 77; Glidden Co. v. County of Alameda (1970) 5 C.A.3d 371; Leach Corp. v. County of Los Angeles (1964) 228 C.A.2d 634; where the assessee claimed that the assessor discriminated against him and/or extended preferential treatment to other taxpayers, Best v. Los Angeles County (1964) 228 C.A.2d 1; Security First Nat. Bank v. County of Los Angeles (1950) 35 Cal.2d 319; Simms v. County of Los Angeles (1950) 35 Cal.2d 303.

Conversely, in a narrow class of cases where the taxpayer raised no valuation or equalization questions whatsoever, and proceeded exclusively on the theory that all of the property assessed was immune or exempt from tax, the questions were not within the jurisdiction of the board of equalization. Parrott & Co. v. City and County of San Francisco (1955) 131 C.A.2d 332; Star-Kist Foods v. Quinn (1960) 54 Cal.2d 507; Parr-Richmond Industrial Corp. v. Boyd (1954) 43 Cal.2d 157; San Diego T. & S. Bank v. County of San Diego (1940) 16 Cal.2d 142; Bank of America v. County of Los Angeles (1964) 224 C.A.2d 108. It followed that the taxpayer, in addition to the judicial remedy of a suit for taxes paid under protest, was permitted to pursue the distinct and cumulative administrative remedy of a claim for refund under Revenue and Taxation Code Sections 5096-5107. Brill v. County of Los Angeles (1940) 16 Cal.2d 726. As stated in El Tejon Cattle Co. v. County of San Diego (1967) 252 C.A.2d 441 at 457:

"The collection of taxes on property exempt from taxation is an erroneous or illegal collection within the meaning of section 5096, Revenue and Taxation Code. . . ."

See also: Parrott & Co. v. City and County of San Francisco (1955) 131 C.A.2d 332, 342:



Mr. Robert J. Dolan

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February 14, 1972

"The function of a County Board of Equalization, as its name implies, is to increase or lower an assessment in order to equalize property assessments on the local rolls, and to make the assessment conform with the true value of the property. (See Rev. & Tax. Code, §§ 1605, 1608.) In the instant case evaluation or revaluation is not involved at all. Here the foreign imports were segregated from the other properties of the taxpayer, and separately assessed. The taxpayers claim, and properly so, that this total assessment was a nullity--beyond the power of the taxing officials to impose. In such a case there is no question of valuation that must be presented to the Board of Equalization for correction before judicial review may be sought. . . ."

Even where the assessee relies exclusively upon an exemption or immunity theory, if a single assessment covers both exempt and taxable property, a valuation question can arise in that an allocation of value is required between the exempt items and the taxable items. Hence, the failure of an assessee to request such an allocation from the board of equalization may preclude judicial relief on the merits of the exemption claim because of failure to exhaust administrative remedies. Compare: El Tejon Cattle Co. v. County of San Diego (1967) 252 C.A.2d 441; Lockheed Aircraft Corp. v. County of Los Angeles (1962) 207 C.A.2d 119. See also: 18 California Administrative Code, Section 302.

Because of difficulty in the application of these general rules, assessees sometimes were denied a judicial determination on the merits because they had failed to exhaust the proper administrative remedy. El Tejon Cattle Co. v. County of San Diego (1967) 252 C.A.2d 441; Bank of America v. Mundo (1950) 37 C.2d 1; Stenocord Corp. v. City and County of San Francisco (1970) 5 C.3d 984. The selection of a proper remedy was facilitated when Revenue and Taxation Code Section 5097 was amended to read in pertinent part, as follows:

"An application for a reduction is an assessment filed pursuant to Section 1607 . . . shall also constitute a sufficient claim for refund under this section if the applicant states in the application that the application is intended to constitute a claim for refund. If the applicant does not so state, he may thereafter and within







Mr. Robert J. Dolan

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the period provided in subdivision (b) file a separate claim for refund of taxes extended on the assessment which applicant applied to have reduced to Section 1607 . . ."

In 1962, Art. XIII, Section 9.5 was added to the California Constitution to authorize separate equalization boards in Los Angeles County. In 1966, this section was amended to authorize (but not to require) the board of supervisors of any county to create assessment appeals boards which would "constitute boards of equalization for their respective counties." Therefore, assessment appeals boards, when created and in existence, succeed to those functions which theretofore had been vested in the county board of supervisors, sitting as a county board of equalization. Notwithstanding that an assessment appeals board has been created in a particular county, the board of supervisors of that county retains power to consider claims for refund under Revenue and Taxation Code Sections 5096-5107 in cases which historically have been deemed outside the jurisdiction of the county board of equalization. Such refund jurisdiction extends to cases where the taxpayer raises no factual questions regarding equalization or valuation of the property and proceeds exclusively on the theory that the property interest assessed is totally exempt or immune from tax.

You are accordingly advised that the collection of taxes on property totally exempt or immune from taxation is an erroneous or illegal collection within the meaning of Revenue and Taxation Code Section 5096, and that the Board of Supervisors does retain jurisdiction to grant or deny claims for refund under that section, notwithstanding that an assessment appeals board has been created and is in existence in the City and County of San Francisco.

The Nestle Company has requested that the Board of Supervisors, sitting as a county board of equalization, determine whether or not certain goods imported for manufacturing purposes retain their immunity from property taxes under the import-export clause (Art. I, § 10) of the United States Constitution. The Board of Supervisors is precluded from hearing this issue as a county board of equalization for two reasons: (1) All equalization functions previously vested in the Board of Supervisors are now vested in the Assessment Appeals Board; and (2) a claim that property is totally exempt or immune from taxation does not raise an issue within the jurisdiction of the board of equalization.



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However, the Board of Supervisors does retain the power to consider the Nestle Company letter as a claim for refund under Revenue and Taxation Code Section 509<sup>1</sup>, and to act upon such claim accordingly.

As legal counsel for the Board of Supervisors, I have investigated the facts behind the claim of the Nestle Company. I recommend that the Nestle Company letter be treated as a claim for refund under Revenue and Taxation Code Sections 5096-5107, and that the claim be denied on the authority of Virtue Bros. v. County of Los Angeles (1966) 239 C.A.2d 220, American Smelting & Refining Co. v. County of Contra Costa (1969) 271 C.A.2d 437, and Youngstown Sheet & Tube Co. v. Bowers (1955) 358 U.S. 534.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 18, 1972

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Francis J. Curry, M.D.  
Director of Public Health  
101 Grove Street  
San Francisco, California 94102

Subject: Laguna Honda Hospital - Memorandum  
of Understanding

Dear Doctor Curry:

You have asked my opinion as to whether or not the parties presently negotiating a memorandum of understanding at Laguna Honda Hospital may, by the terms of said memorandum, amend Civil Service Rule 56 (City Grievance Procedure), and whether or not the hospital administrator at Laguna Honda may be designated the "appointing officer" for the purposes of carrying out said grievance procedure.

Section 3.661 (formerly § 141) of the Charter, in pertinent part, states as follows:

"The commission shall adopt rules to carry out the civil service provisions of this charter and, except as otherwise provided in this charter, such rules shall govern applications; examinations; eligibility; duration of eligible lists; certification of eligibles; appointments; promotions; transfers; resignations; lay-offs or reduction in force, both permanent and temporary, due to lack of work or funds, retrenchment, or completion of work; the filling of positions, temporary, seasonal and permanent; classification; approval of payrolls; and such other matters as are not in conflict with this charter. The commission may, upon one week's notice, make changes in the rules, which changes shall thereupon be published, and be in force; provided that no such change in rules shall affect a case pending before the commission." (Emphasis added.)





Francis J. Curry, M.D.

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The use of the word "shall" is commonly interpreted to signify a command. (See: People v. O'Rourke (1932) 124 C.A. 752, 758; People v. Municipal Court (1956) 145 C.A.2d 767, 776.)

Pursuant to the authority vested in the Civil Service Commission under Charter Section 3.661, Rule 56 was promulgated and, pursuant to that same authority, the commission may, upon proper notice, change Rule 56, or any other rule similarly adopted.

The adoption of said rules by the Civil Service Commission is mandatory and involves the exercise of discretionary powers vested in the commission. Discretionary powers, as opposed to purely ministerial powers, are held to be nondelegable. (See: Letter Opinion of the City Attorney, No. 71-28, May 10, 1971.)

A memorandum of understanding, while presumably binding upon the parties signatory, does not have the status of an ordinance and, with regard to the latter, it is the general rule that an ordinance cannot conflict with, exceed or limit the effect of a Charter provision. (Hartford Acc., Etc., Co. v. City of Tulare (1947) 30 Cal.2d 832, 836; Marculescu v. City Planning Commission (1935) 7 Cal.App.2d 371.)

There being no indication that the Civil Service Commission desires to attempt to delegate the authority to change Rule 56 to the parties in question and, based upon the body of law which prohibits even an ordinance from "conflicting with, exceeding or limiting the effect of a Charter provision," it is my opinion that an attempt to alter, change or modify the provisions of Rule 56 by the terms incorporated in a memorandum of understanding would be ineffectual and void.

My opinion that Rule 56 cannot be changed, except by the Civil Service Commission and pursuant to Charter requirements, should not be interpreted as precluding the parties to a memorandum of understanding from providing administrative procedures at the departmental level which operate to implement and/or expedite the provisions of Rule 56. Such procedures should, of course, not conflict with said rule.

Chapter Five, Part One, Section 3.501 (formerly § 20) of the San Francisco Charter sets forth the general powers and duties of department heads.



Francis J. Curry, M.D.

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In pertinent part, it provides that the "chief administrative officer and each department head appointed by the chief administrative officer shall have the powers and duties of a department head, except as otherwise specifically provided in this chapter."

Section 3.501 goes on to provide as follows:

"He (department head) shall act as the 'appointing officer' under the civil service provisions of this charter for the appointing, disciplining and removal of such officers, assistants and employees as may be authorized. On written recommendation of the department head concerned and the approval of the chief administrative officer, board or commission to whom such department head is responsible, the head of any utility, institution, bureau or other subdivision of such department may be designated as the appointing officer for such utility, institution, bureau or other subdivision \* \* \*."

According to Section 3.510 of the Charter, the Chief Administrative Officer has the power and the duty to appoint a duly qualified person to act as Director of Public Health to administer the Department of Public Health. The Director of Public Health is in charge of, inter alia, San Francisco General Hospital, Laguna Honda Home, Hassler Health Home and the Emergency Hospital Service.

According to Section 3.501 of the Charter, the Director of Public Health is defined as a department head and shall act as the "appointing officer." Additionally, as department head, he may, in writing, recommend to the Chief Administrative Officer that a head of a subdivision of the Department of Public Health be designated as the "appointing officer" and the Chief Administrative Officer may approve or disapprove of such a recommendation.

In my opinion, San Francisco General Hospital, Laguna Honda Home, Hassler Health Home and the Emergency Hospital Service are "subdivisions" of the Department of Public Health within the meaning of Charter Section 3.501, and the administrators who are in charge of said subdivisions may, according to proper Charter procedure as outlined above, be designated as the appointing officer for the particular institution.







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It should be pointed out that such designation as the "appointing officer" by the Chief Administrative Officer would not be exclusively for the purposes of administering Rule 56 of the Rules of the Civil Service Commission, but would extend to acting as "appointing officer" under the civil service provisions of this Charter "for the appointing, disciplining and removal of such officers, assistants and employees as may be authorized." (Charter § 3.501, par. 3.)

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



February 23, 1972

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Mr. Joseph J. Botka  
Chief Probation Officer  
Youth Guidance Center  
375 Woodside Avenue  
San Francisco, California 94127

Subject: Employees' Use of Normal Working  
Hours to Attend Union Meetings

Dear Mr. Botka:

This is in response to your letter of February 4, 1972, wherein you requested my opinion as to whether you are required to give staff time off from normal working hours for their attendance at union meetings or whether you have legal authority to establish a policy that two hours a month of normal work time be set aside for union meetings.

Section 3505.3 of the Government Code (Meyers-Miliias-Brown Act) provides as follows:

"Public agencies shall allow a reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the public agency on matters within the scope of representation."  
(Emphasis added.)

As you may know, the City and County of San Francisco has drafted a proposed ordinance which is presently before the Legislative and Personnel Committee of the Board of Supervisors. The proposed ordinance contains provisions by which an employee organization can become "recognized" and designates the representative of the City and County with which recognized employee organizations may meet and confer.

At the present time only the San Francisco Police Officers Association and the Officers for Justice have been "recognized"



Mr. Joseph J. Botka

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by the City and County. (Board of Supervisors Resolution 9-17, January 16, 1971.)

Public employees have the right to join or refrain from joining employee organizations for the purpose of representation on all matters of employee-employer relations (§ 3502 of the Gov. Code).

The City and County is required to permit a reasonable number of employee representatives of recognized employee organizations reasonable time off without loss of pay or benefits for the purpose of meeting and conferring with representatives of the public agency. No employee organization has been recognized as representing the Juvenile Court Probation Officers and "union meetings" do not fall within the meaning of "meet and confer" as defined in Section 3505, paragraph 2 of the Meyers-Milius-Brown Act.

Section 8.400 of the Charter provides in pertinent part as follows:

"No officer or employee shall be paid for a greater time than that covered by his actual service . . . ."

The services for which compensations are established for positions pursuant to Section 8.401 of the Charter are based on normal work schedules and conditions of employment specified in the Salary Standardization Ordinance and the Annual Salary Ordinance. These ordinances do not provide for pay for attendance at regular union meetings during normal work schedule periods and such attendance does not per se constitute city work or city service. Compensation, therefore, could not be paid for the hours of such attendance under the provisions of the Annual Salary or Salary Standardization Ordinances or Section 8.400 of the Charter unless you could determine in a particular situation that the attendance at a particular meeting, because of the nature of the meeting or the nature of the attendance, constituted city and county work or service.

You are accordingly advised in direct answer to your questions that you are not required to give staff time off from normal working hours for their attendance at union meetings and that you do not have legal authority to establish a policy that two hours a month of normal work time be set aside for union meetings.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





February 24, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Proposed Ordinance re Revocable  
Permits for Minor Sidewalk  
Encroachments in FACE area

Dear Mr. Dolan:

This is in response to your letter of January 28, 1972, regarding the proposed ordinance authorizing the issuance of revocable permits for minor sidewalk encroachments.

Your letter enunciated three questions raised by the Streets and Transportation Committee of the Board of Supervisors. The questions will be stated and answered in the order asked.

1. Would it be discriminatory to the rest of the City to restrict the ordinance to one or two-family dwellings located in a FACE area?

Initially, it must be noted the proposed ordinance is not presently limited in any way to application in a FACE area only. In fact, I am advised by the Bureau of Engineering that the problem of future installation and maintenance of minor encroachments is a city-wide problem, not in any way limited to FACE areas where the primary problem is maintenance of existing minor encroachments.

By way of background, Charter Section 24 authorizes the Board of Supervisors to regulate by ordinance the issuance of permits for encroachment on public streets. This proposed ordinance, which would add Section 723.2 to the Public Works Code, is the Board of Supervisors' attempt to provide by ordinance for the issuance by the Director of Public Works of revocable permits for encroachments of a permanent nature; e.g., walls, steps and the like. The issuance of permits for encroachments of a



Mr. Robert J. Dolan

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temporary nature is provided for in Section 724 of the Public Works Code.

Parenthetically, it should be noted that "street" in a legal and general sense includes "sidewalks." A sidewalk is that part of a street intended for pedestrians. McQuillin, Municipal Corporations, Vol. 10, pp. 621, 641, 643.

As a general rule, whatever the rights of the city may have over its streets, its powers are those of a trustee for all of the public's benefit. Therefore, the streets must be kept free from unreasonable encroachments which impair its use as a public path of travel. See Pond v. Pasadena, 46 P.2d 801, 803, and 6 Cal.2d 139; Ex parte Graham, 93 C.A. 88.

However, municipalities can authorize structures in streets for private use or benefit which are reasonably incidental to ordinary street use. Minor encroachments not seriously interfering with the use of the sidewalk by the public for travel are usually permitted by an express permit pursuant to ordinance. See McQuillin, Municipal Corporations, Vol. 10, p. 745. The proposed ordinance attempts to do this. Although the city has discretion in authorizing the use of its streets by individuals for private purposes, it clearly may not discriminate in the exercise of such authority. When the municipality classifies persons for licensing purposes, its regulations must apply equally to all within the same class where circumstances are similar. McQuillin, Municipal Corporations, Vol. 10, p. 818. I am of the opinion that it may be discriminatory to authorize the Director of Public Works to issue encroachment permits to owners of one or two-family dwellings only in FACE areas, and not to authorize such issuance to owners of identical property in other than FACE areas. Some uniformity in licensing requirements is required under the Federal Constitutional requirements of due process and equal protection. The requirement of equal protection is not met where a law is applied differently to different persons in a similar circumstance. See McQuillin, Municipal Corporations, Vol. 9, p. 137.

In Storch v. Baltimore, 61 A. 330, a statute forbidding the erection of steps on sidewalks only in certain districts of the city was held to be invalid because it was based on an arbitrary classification. In City of Pierce v. Schramm (1927) 216 N.W. 809, the city was prevented from allowing one abutting property owner to use the sidewalk area for gasoline pumps, while





Mr. Robert J. Dolan

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denying such use to a similarly situated abutting property owner. Finally, in St. Louis v. Spiegel, 2 S.W. 839, the Missouri Supreme Court found that a license fee which varied in different parts of the city was discriminatory.

2. Could the ordinance be limited to one year's duration?

This question can succinctly be answered "yes." However, the need for such a self-repealing ordinance is not clear, since each permit issued under the proposed ordinance would be revocable and the entire ordinance can be repealed at any time as presently worded.

3. Could the \$225.00 permit fee be waived by the Board in hardship cases?

Charter Section 24, in addition to authorizing the Board of Supervisors to regulate the issuance of encroachment permits, provides that "Such ordinance shall fix the fees or licenses to be charged, which shall not be less than the cost to the City and County of regulation and inspection; . . . ." I understand such language as absolutely requiring a fee and in an amount relating to the actual cost to the City. Thus, the Board of Supervisors could not waive the permit fee in hardship cases.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



March 9, 1972

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San Francisco Classroom  
Teachers Association  
810 Fox Plaza  
San Francisco, California 94102

Attention: Mr. Jack Riskin

Subject: San Francisco Unified School District's  
Providing Health Care Coverage Other  
Than Through Health Service System

Gentlemen:

This is in response to your letter dated February 26, 1972, requesting my advice with respect to the procedures involved in the San Francisco Unified School District's providing health care coverage for its teachers other than through the Health Service System.

Initially, it should be noted that the Health Service System provides that a person may claim an exemption from coverage under that system if (a) his annual salary exceeds \$8,500.00, or (b) he has provided in some other manner for adequate medical care as defined by the Health Service Board. I would imagine that all of the full-time teachers in the San Francisco Unified School District would qualify for exemption based on their salaries. In addition, if the School District were to provide health care coverage at least commensurate with that now provided under the various Health Service System plans, teachers included in the coverage provided by the School District would be eligible to claim an exemption on the basis of that coverage.

As you probably know, the Health Service System rules now provide that a claim of exemption may be made only during the month of May, with the exemption to be effective on the following July 1. Therefore, as this rule now stands, it would be necessary that all details whereby the School District would assume responsibility for providing health care coverage be completed by



San Francisco Classroom  
Teachers Association

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March 9, 1972

May, so that teachers would be able to claim their exemption. The Health Service Board does have the power to amend its rules and, therefore, it would be possible for the Board to amend its exemption rule to permit teachers to claim their exemption at such time as the School District commences to provide its own health care coverage. I would suggest that you discuss such amendment of the rules with Mr. Philip J. Kearney, Executive Director of the Health Service System.

You inquire as to the procedures which the School District should follow in order to provide health care coverage for teachers in lieu of coverage under the Health Service System. This subject matter is governed by the provisions of Government Code Sections 53200, et seq. In general, the School District would contract with one or more health insurance carriers or health service organizations for such plan or plans as the Board of Education determined to be in the best interests of the School District and its teachers. (Gov. Code, §53202.) Each contract would contain a detailed statement of the benefits to be provided, together with such limitations, exclusions and other details as may be necessary or desirable.

If the Board of Education determines to undertake such a program, the initial step would be to solicit proposals from various health insurance carriers and health service organizations, so that the Board of Education may determine which of them it will contract with to provide coverage for its teachers.

I hope that the foregoing information will be of assistance to you.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

cc: Mr. Philip J. Kearney  
Executive Director  
Health Service System  
450 McAllister Street  
San Francisco, California 94102



ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED

DATE OF REVIEW: 10/10/00  
BY: [illegible]  
REASON: [illegible]

DATE OF REVIEW: 10/10/00  
BY: [illegible]  
REASON: [illegible]

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REASON: [illegible]

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March 10, 1972

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Donald M. Scott, Chief  
San Francisco Police Department  
850 Bryant Street  
San Francisco, California 94103

Subject: Authority of Police Department to  
Require Extra Duty Hours in Lieu  
of Suspension

Dear Chief Scott:

This responds to your letter inquiring into the possibility of the Police Department requiring an officer to work extra duty hours rather than being suspended for a period up to ten days for disciplinary purposes as provided by Section 8.343 of the Charter (former § 155). You state that your inquiry is motivated by your concern that the department loses the services of the member during the period of his suspension and because the loss of pay works a hardship on the member's family.

As you know, Charter Section 8.451(b) establishes the basic work week as one of 40 hours. Subsection (d) states that whenever a member of the department serves in excess of the basic work week ". . . said member shall be compensated therefor or shall receive equivalent time credited to him in lieu thereof . . ." (Emphasis added.) It is the clear intent of this section to insure that police officers receive compensation for all hours worked. This, of course, would preclude an officer being required to work as a disciplinary measure without compensation.

Furthermore, Charter Section 8.343 limits the power of the Police Department to punish or discipline a member. There are only five authorized means of punishment or discipline: (1) reprimand; (2) fine not exceeding one month's salary; (3) suspension not to exceed three months; (4) dismissal; and (5) suspension for a period not to exceed ten days for disciplinary purposes.

However, while an officer may not be required to work extra hours without compensation in lieu of suspension, I do not



Donald M. Scott

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March 10, 1972

believe that the foregoing laws would preclude the adoption of a procedure in the department, with the approval of the Police Commission, whereby an officer could voluntarily elect to work equivalent extra time in lieu of the disciplinary suspension without pay by signing a written election and waiver of pay for the extra time worked. If you wish to establish such a procedure, I shall be pleased to render whatever assistance is required.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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March 13, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: File No. 159-72; Proposed Charter  
Amendment to Provide that Superin-  
tendent of Community College District  
Shall Serve at Pleasure of Governing  
Board at a Salary to be Fixed by Said  
Board and Approved by Board of  
Supervisors

Dear Mr. Dolan:

This is to advise that I am hereby withdrawing my approval as to form of the above captioned proposed charter amendment as the result of additional research developed in connection with another proposed charter amendment relating to the Superintendent of Schools of the Unified School District. (Your File No. 138-72.)

While the State Constitution empowers a city and county to provide in its charter for the method by which county officers and municipal officers shall be elected or appointed (Cal. Const., art. XI, §§ 3(b), 4(c), 5(b), 6(c)), the superintendent of a community college district is neither a county officer nor a municipal officer but is an employee of the community college district. (Main v. Claremont Unified School District, 161 Cal.App. 2d 189; 30 Ops.Cal.Atty.Gen. 347.) The State Constitution also provides that the provisions of a city or city and county charter, with respect to municipal affairs, shall supersede all laws inconsistent therewith. (Cal. Const., art. XI, § 5(a).) However, the "municipal affairs" doctrine has been held not to include school matters (Esberg v. Badaracco, 202 Cal. 110) and hence the provisions of general law control over conflicting provisions of a city and county charter. (Esberg v. Badaracco, supra.)

Section 935 of the Education Code provides that the governing board of any community college district may employ a district



Mr. Robert

Mr. Robert J. Dolan

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March 13, 1972

superintendent and Section 938 of the Education Code provides that any district superintendent of schools may be elected for a term of four years.

In view of the foregoing, it is my opinion that the Charter of the City and County may not be amended to provide that the Superintendent of the Community College District shall serve at the pleasure of the governing board thereof.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

TO: SAC, [illegible]

FROM: [illegible]

SUBJECT: [illegible]

[illegible]

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March 16, 1972

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Mr. John D. Crowley  
General Manager of Public Utilities  
287 City Hall  
San Francisco, California 94102

Subject: Municipal Railway  
Transit Advertising Agreement

Dear Mr. Crowley:

By letter of this date, photocopy attached, you have asked for the advice of this office whether advertising space for the message and the purposes described in your said attached letter may be refused to the Transport Workers Union under the terms and conditions of the existing Transit Advertising Agreement.

In confirmation of the oral advice given you in our conference of this morning, you are herewith informed that it is the opinion of this office that neither the Commission nor Metro Transit Advertising may legally refuse to accept the proposed advertising in question, so long as the proposed advertisers meet the same reasonable requirements for space procurement as are imposed upon general advertisers, or applicants for advertising, in or on Municipal Railway vehicles.

We feel that the above conclusion is compelled by virtue of the holding of the California Supreme Court in Wirta v. Alameda-Contra Costa Transit District, 68 Cal.2d 51 (1967). Therein, an advertising space contract was also given by the District to Metro Transit Advertising, and that contract provided, as does ours, that political ads and ads on controversial subjects required District approval, and also that advertising objectionable to the District would be removed by Metro.

After the lengthy treatment by the Court of the entire subject of constitutional guarantees and free speech and equal protection of the law, the Supreme Court concluded that neither





Mr. John D. Crowley

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March 16, 1972

Metro nor the District were free to reject, on terms common to all accepted advertising, a message by proponents for ending the Vietnam War.

It is the conclusion of this office that all of the same principles expressed in that case would be applicable concerning the issues raised by you in your said letter of today to us.

Accordingly, you are advised as above set forth. Should you need further assistance regarding these issues, please call or write.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

Encl.

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COMMUNICATIONS SECTION

March 17, 1972

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Honorable Robert H. Mendelsohn  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Public Streets-Warning Devices; Public Works  
Code Section 568.1

Dear Supervisor Mendelsohn:

You asked that legislation be drafted to meet the problem described in Mr. Brennan's letter to you of February 16, 1972. In that letter Mr. Brennan states that he had a case involving boxcars parked without proper warning devices on a public street in the city. He correctly pointed out that Section 568.1 of Part II, Chapter X, of the San Francisco Municipal Code (Public Works Code) prohibits a rail carrier from parking a freight car on a spur track in a public street during the hours of darkness unless such freight car is equipped with red reflectors or other suitable illuminating devices.

In a telephone conversation with Mr. Brennan he stated as the only foundation for his claim that the section was inadequate was an argument of the attorney representing the Southern Pacific Company that the particular track upon which the freight car was standing was not a "spur track."

Section 14 of the Charter of the City and County of San Francisco requires that a permit be obtained from the Director of Public Works before a spur track is laid. Similarly, Article II of Part II, Chapter X, of the San Francisco Municipal Code (Public Works Code), in which the Section 568.1 referred to by Mr. Brennan is located, is concerned only with spur tracks.

Both the Charter and the Municipal Code concern themselves only with spur tracks; but nowhere in either the Charter or the Municipal Code is a definition of "spur track" to be found. The most complete definition is found in the case of Detroit & M. Railway Co. v. Boyne City, G. & A.R. Co., D.C. Mich. 286 F. 540 at page 547, to wit:





Honorable Robert H. Mendelsohn 2

March 17, 1972

(The difference between new lines or extensions, on the one hand, and spur, industrial, team, switching or side tracks on the other, as the terms are used in Interstate Commerce Act, §1, pars. 18-22, as amended by Transportation Act Feb. 28, 1920, §402, 49 U.S.C.A. §1, is): "That the former are tracks over which there are to be train movements in the sense that such movements are a part of the actual transportation haul from the shipper to the consignee, while the latter named tracks are for use in loading, reloading, storing, and switching the cars and other things merely incidental to the regular train haul."

According to this definition, the tracks with which Mr. Brennan is concerned would appear to fall within the operation of Section 568.1, and as such any freight car left standing during the dark hours of the day must be equipped with reflectors or other suitable warning devices.

"Spur track" as defined above is the only type of track which authority allows in a public street. As such, it is the only type of track which is the subject of regulation by the City. However, as the definition would include the track with which Mr. Brennan is concerned, and as authority exists which would alleviate the condition which concerns him; i.e., the parking of freight cars on public streets without warning devices during the hours of darkness, no new or additional legislation is necessary to deal with the situation described.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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CONFIDENTIAL

1. The first of the three main points of the report is that the Government has failed to provide adequate information to the public about the progress of the investigation. This is a serious failure, and it is the responsibility of the Government to provide the public with the information they need to make informed decisions about the investigation.

2. The second point of the report is that the Government has failed to provide adequate information to the public about the progress of the investigation. This is a serious failure, and it is the responsibility of the Government to provide the public with the information they need to make informed decisions about the investigation.

3. The third point of the report is that the Government has failed to provide adequate information to the public about the progress of the investigation. This is a serious failure, and it is the responsibility of the Government to provide the public with the information they need to make informed decisions about the investigation.

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March 23, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: File No. 152-72; Necessity to Amend Charter  
Section 8.400 to Permit Civil Service Commission  
to Utilize Data Processing in Examination of  
Payrolls

Dear Mr. Dolan:

This is in response to your request that I advise the Legislative and Personnel Committee whether or not it is necessary to amend the Charter to provide that the Secretary of the Civil Service Commission may rely on results of data processing in evaluating legal appointments of persons whose names appear on payrolls.

In my opinion, the present Charter language that "the secretary of the commission shall examine and approve such payroll" does not preclude the secretary from utilizing electronic data processing as a method of performing his duty to examine such payrolls in lieu of his present practice.

However, the proposed amendment then goes on to change the duty of the secretary from approval of the payroll to approval or disapproval of exception reports produced by such data processing and authorizes the controller to draw payroll warrants unless disapproved by the secretary, rather than drawing such warrants only upon approval of the secretary. To achieve this latter result, the proposed Charter amendment is necessary.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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MAYOR'S OFFICE  
1972 APR 19 PM 10:26  
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ASSISTANT

March 23, 1972

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Mr. Wallace Wortman  
Director of Property  
Real Estate Department  
450 McAllister Street  
San Francisco, California 94102

Subject: Public Utilities Commission,  
Moccasin Store & Post Office Lease

Dear Mr. Wortman:

By letter of March 15, 1972, you have asked for our legal opinion upon the issue of whether the existing lease indicated above may be extended or renewed, for perhaps a ten (10) year period, through a negotiation process, rather than through a process of public bidding.

Your letter sets forth the factual situation regarding the premises, and you have also sent us a drawing describing said premises. After studying each such descriptive item, it is our conclusion that a renewal or extension of lease may be negotiated with Mr. Segale, without legal need for public bidding.

City's building contains the local U.S. Post Office, and Mr. Segale is the local Postmaster by appointment from the Federal Government. The remainder of the premises includes living quarters, an adjacent garage, and a store facility. The Post Office, the living quarters and the store make up a single unit, and only the garage is detached, but immediately contiguous to the main building. The history of this leasehold shows that only the Moccasin Postmaster has been interested in bidding on the premises. This was true not only in 1967 when the current lessee-Postmaster, James W. Segale, was the only bidder, but was the pattern when his father, William H. Segale, held the lease for a number of years during his incumbency as Postmaster.

A basic legal requirement for bidding in the leasing of public property is dispensed with by the law in an instance where





Mr. Wallace Wortman

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March 23, 1972

such a procedure has the dominant appearance of a fruitless, useless adherence to form, without any reasonable expectation that the public interest will be served. It would appear that the property in question can be used by no one other than the Moccasin Postmaster, and in such circumstance it would seem absurd to engage in the unrealistic charade proposing a procedure of public bidding. The law neither compels nor encourages the performance of absurdities.

In light of all of the distinctly unique circumstances which mark the situation under consideration, you are advised that you may negotiate an extension or renewal of Mr. Segale's present lease, and need not propose the matter to public bidding.

Should you need further assistance herein, please call or write.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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MARCO'S OFFICE  
1972 APR 19 PM 10:28  
ATTENTION  
23-11111

March 24, 1972

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Mr. Joseph E. Tinney, Assessor  
City and County of San Francisco  
101 City Hall  
San Francisco, California 94102

Subject: Arab Republic of Egypt; Tax Exempt Status of  
Property at 3001 Pacific Avenue

Dear Mr. Tinney:

You asked whether the property at 3001 Pacific Avenue, which is owned by the Arab Republic of Egypt, enjoys a tax-exempt status with respect to the ad valorem property tax.

The history of the subject premises which led to the question of exemption is as follows:

Taxes were paid on the premises from 1960 until 1966. Prior to June 1967, the property was used by the Consulate General of the United Arab Republic (now the Arab Republic of Egypt), but diplomatic relations between the two governments were severed in 1967. The San Francisco Consulate General was closed and the consular property came under the jurisdiction of the Embassy of India's Egyptian Interests Section. From the time the consular office was closed until the property was leased to the Delancy Street Foundation in the summer of 1971, the premises were used solely for the purpose of storing consular property, such as consular files, records and equipment and furniture.

As you know, the opinion of this office with respect to the taxation of consulates, as indicated in our January 12, 1970, letter to you, is that property owned by a foreign government which is used exclusively as a residence of a foreign consul, and for governmental purposes within the customary sphere of consular activity, is exempt from any and all property taxes, even though there may be no express treaty with that foreign state.

Attached are three letters from the United States Department of State which deal specifically with the Arab Consulate.





Mr. Joseph E. Tinney

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The first, dated July 20, 1970, from Louis G. Fields, Jr., indicates that the severance of diplomatic relations between the United States and Egypt does not alter treaty obligations which existed at the time of severance.

The second, from Stephen M. Boyd to the Arab Republic of Egypt Interests Section of the Indian Embassy, dated February 7, 1972, states that the premises would be entitled to a tax exemption under Article 32 of the 1963 Vienna Convention on Consular Relations for the reason that storage of consular property therein until the property was leased qualified them as "consular premises."

The third letter, dated March 20, 1972, from K. E. Malmberg to Deputy City Attorney Philip Moscone, indicates that real property designated as consular property which is located in Egypt and is owned by the United States is not assessed any property taxes by the Republic of Egypt.

We agree with the opinion set forth by the Department of State; viz., that the premises at 3001 Pacific Avenue should enjoy a tax exemption until the date on which they were held out for lease last summer.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

Encls.

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March 24, 1972

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Mr. Thomas J. Mellon, Chairman  
Business Tax Board of Review  
289 City Hall  
San Francisco, California 94102

Subject: Appeal No. 59. Simpson, Strata & Associates

Dear Mr. Mellon:

You asked our opinion of the above captioned appeal, the gravamen of which was whether an architect could reasonably be classified as a "Contractor" as defined by the original (1968) Business Tax in Section 4.02.

This section defines a "Contractor" as follows:

" . . . any person . . . who in any capacity . . . undertakes to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or by or through others construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding, or other structures or works in connection therewith." (Emphasis added.)

An exception is provided for

" . . . an owner who contracts for a project with another person who is licensed by the State of California as a contractor or architect or registered civil engineer acting solely in his professional capacity, . . ."

The ordinary definition of a "Contractor" is also as defined above. Howard v. State, 85 Cal.App.2d 361; Albough v. Moss Const. Co., 125 Cal.App.2d 126; Business and Professions Code, Section 7026.



Mr. Thomas J. Mellon

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March 24, 1972

An architect, on the other hand, is one who makes plans and specifications for a building and superintends its construction. Payne v. DeVaughn, 77 Cal.App. 399; McDowell v. City of Long Beach, 12 Cal.App.2d 634.

The Business and Professions Code of the State of California also clearly limits the function of an architect to the planning and supervision of construction in Sections 5500 and 5500.1 as follows:

"§ 5500. Architect defined

"As used in this chapter, architect means a person who holds a certificate to engage in the practice of architecture in this State under the authority of this chapter."

"§ 5500.1. Practice of architecture

"A person engages in the practice of architecture within the meaning and intent of this chapter who holds himself out as able to perform or who does perform any service which requires or would require the application of the science, art, or profession of planning sites or of planning or designing buildings or architectural structures and their related facilities. Such services may include consultation, investigation, evaluation, planning, design, the preparation of instruments of service such as drawings and specifications, and supervision of construction insofar as customarily performed by architects."

Appellant contended that Section 4.02 of the Business Tax Ordinance was vague and uncertain. However, the language of that section appears no more difficult to read than does the usual and customary language employed in municipal ordinances and state and federal statutes.

It is our opinion, therefore, that Section 4.02 of the Business Tax Ordinance does not include architects within the definition of "Contractor."

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



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March 28, 1972

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Honorable Quentin Kopp  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Abandonment of Partially Completed  
Medical Center Project and Expenditure  
of Remaining Bond Funds for School  
Purposes

Dear Supervisor Kopp:

This is in response to your March 17, 1972, letter referring to provisions of State law which authorize the abandonment of a bond project and the expenditure of the bond funds for another designated public purpose. You ask whether under such law the present construction of the San Francisco Medical Center could be terminated and the unexpended San Francisco Medical Center bond funds be expended on school construction and whether the consent of the electors and bondholders would be required.

The provisions of State law to which you refer are contained in the Municipal Bond Act of 1901, codified as Sections 43600 to 43638 of the Government Code, under which the bonds were issued and in particular Section 43631 thereof which reads as follows:

"§43631. Determination that purpose for which bonds voted impracticable or unwise: Election to obtain electors' consent to use money for other purposes: Procedure. When the legislative body determines by resolution that the expenditure of money raised by the sale of bonds for the purpose for which the bonds were voted is impracticable or unwise, it may call a special election to obtain the consent of the electors to use the money for some other specified municipal purpose.

"The procedure shall be the same as when the bond proposition was originally submitted."



Honorable Quentin Kopp

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A determination to abandon the project and to make no further expenditures of bond funds therefor beyond those which have already been expended and those which are legally obligated under the contract would be solely the Board's determination as the only role of the electorate under Section 43631 is to consent to the use of the remaining funds for some other specified municipal purpose when the exact amount of the remainder is determined. This could only be done when the exact amount of damages to be paid to the contractor for the termination of his contract would have been ascertained.

In acting under the provisions of Section 43631, the Board would be doing so administratively and not legislatively and the power to determine vested in the Board would be subject to possible judicial review from the standpoint of whether, under the circumstances, it exceeded its authority or abused the discretion vested in it.

The circumstances here involve far greater public consequences and far more serious problems than when a determination is made with respect to bond funds that are intact. The construction of the hospital is under way under an existing contract and already millions of dollars of the bond funds have been expended for the project. In this connection Mr. Thomas Mellon, Chief Administrative Officer, reports as follows:

"The amount of \$5,249,634 has been expended for the construction of the new Service Building, the first unit of the new hospital, containing a new power plant and laundry. The Service Building was completed in June 1971. The construction of the main building for the new Medical Center was started in July 1971 and is progressing rapidly, slightly ahead of schedule. Approximately \$2,150,000 has been expended or encumbered in architectural fees, inspection services, engineering services, etc. The main building is more than fifteen percent complete, which would indicate an expenditure of about \$3,900,000 as of February 1.

"As of February 1, more than fifteen million dollars of the total bond funds have been expended or encumbered, and the remaining balance of about \$18,500,000 is also encumbered in the contract signed in June 1971 for the construction of the main building.





Honorable Quentin Kopp

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It is not possible to estimate what the costs would be of severance of this contract, but it would certainly be in the millions of dollars.

"In addition to the amounts above, over six million dollars have been received in Federal subventions for the construction of the new Medical Center, and the appropriate State of California and Federal health authorities have approved the plans and construction of the Service Building and the main building at each step of the planning and construction."

It is also to be considered that the Board of Supervisors has previously adopted a resolution that public interest and necessity required the construction of the Medical Center and enacted an ordinance calling an election to secure the authorization of the voters to incur a bonded indebtedness for the specified purpose of the construction of a Medical Center. The resolution of public interest and necessity and the ordinance calling the election and the authorization by 77 per cent of the voters voting on the proposition created a relationship between the electorate and the City in the nature of a contractual relationship, the essence of which is that the funds derived from the sale of the bonds would be used to construct the specific facility for which the bonds were authorized. If the project is abandoned and the existing contract terminated, this contractual commitment with the electorate would not have been effectuated and a presently undetermined number of millions of dollars of public bond funds would have been expended not for a complete Medical Center but for a powerhouse, an excavation and caissons and for damages sustained by the contractor by reason of the termination of his contract.

The foregoing circumstances would not preclude the abandonment of the project and the termination of the contract if the Board, acting in good faith and not arbitrarily or unreasonably, could find that the completion of the Medical Center and the expenditure of further bond funds therefor would be impracticable or unwise. However, under such circumstances, which would involve a substantial loss of the public funds of the City, any such finding would have to be thoroughly supported in the Board's records by testimony and evidence of an expert nature developed at a public hearing in order to withstand judicial attack.



Honorable Quentin Kopp

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If such a determination were made by the Board and a diversion of the funds was ultimately made to another specified municipal purpose, the consent of the bondholders would not be required as under a general obligation bond issue there is no contractual commitment requiring such consent.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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1972 APR 19 PM 10:26  
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ASSISTANT

April 4, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Legality of Proposed Ordinance to Prevent  
Loitering on Private Premises near  
Balboa High School

Dear Mr. Dolan:

This refers to your letter to this office in which you refer to a meeting Board President Ronald Pelosi has held regarding problems presented to persons residing in the vicinity of Balboa High School by students who congregate on the side-walks across the street from the high school.

President Pelosi expressed an interest in the possibility of legislation ". . . which would prohibit loitering on or about the premises of private residences and consequent disturbance of citizens in their homes. They refer particularly to the conduct of certain minors and others who congregate on steps of private homes and comport themselves in such a way as to interfere with the resident's enjoyment of their premises."

A petition directed to the District Attorney more precisely describes the particular complaints:

"We the undersigned, taxpayers, property owners and concerned citizens bordering Balboa High School resent our property being used by student and non students as a garbage dump for their trash.

"We demand that no student be allowed to loiter on or around our property during the school day. We also resent our steps being used for the smoking of marijuana (sic) obscene love making, vulgarity, and general rude behaviour as





Mr. Robert J. Dolan

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well as threats to residents by students at all hours of the day when they should be attending classes."

There are on the books a number of statutes prohibiting the particular activities mentioned in the petition. For instance, Section 11530 of the Health and Safety Code prohibits possession of marijuana and its use; Section 215 of the Police Code and Section 314 of the Penal Code prohibit lewd and indecent actions; Section 37 of the Police Code prohibits throwing of rubbish on streets; Section 647 of the Penal Code prohibits disorderly conduct; Section 647(c) of the Penal Code prohibits obstructing the sidewalks; Section 415 of the Penal Code prohibits breaches of peace; Section 602 of the Penal Code, subsection "1" prohibits trespassing wherein the trespasser enters and occupies real property without the consent of the owner; Section 374(b) of the Penal Code prohibits littering on public and private property; Sections 370, 372 of the Penal Code prohibit public nuisances.

It appears that petitioners seek legislation which would eliminate the presence of the students from the sidewalks in front of the houses around Balboa High School. It is a well recognized principle of constitutional law that the state may not enact legislation prohibiting assembling and meeting on the sidewalks and other public places. In two recent cases general "loitering" and "vagrancy" statutes have been declared unconstitutional by the United States Supreme Court as being vague and overly broad. (Coates v. City of Cincinnati, decided June 1, 1971, 402 U.S. 611; and Papachristou v. City of Jacksonville, decided February 24, 1972, CCH B 1067 \_\_\_\_\_ U.S. \_\_\_\_\_; 92 S.Ct. 839.) In the Coates case the court declared unconstitutional the statute containing this language:

"It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars (\$50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both." Section 901-L6, Code of Ordinances of the City of Cincinnati (1956 ed.). (Emphasis added.)



Mr. Robert J. Dolan

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In my opinion the problem does not arise from inadequate laws and the generalized type of ordinance requested would be constitutionally unenforceable. The problem appears to be one of enforcement of present law or school regulations. Therefore, it is my recommendation that means of enforcement of existing laws should be explored with the Police Department and the District Attorney's office and would also suggest that the office of the Superintendent of Schools be consulted concerning their present school regulations or enactment of additional school regulations to deal with the problem.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





April 7, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Golden Gate Bridge, Highway and  
Transportation District, Taxing Powers

Dear Mr. Dolan:

This is in response to your letter of March 7, 1972, wherein you request my advice as to what powers the Golden Gate Bridge, Highway and Transportation District has to tax residents and real property owners of the counties comprising the District.

In my review of the law with respect to this question, I have had occasion to review the opinion of Mr. Thomas M. Jenkins, counsel for the District, and the opinion of Mr. George H. Murphy, Legislative Counsel of California with respect to this question.

The Legislative Counsel concludes that the District has no present taxing power in view of the provisions of Section 27200 of the Streets and Highways Code which reads as follows:

"No taxes shall be levied under the provisions of this chapter for the purpose of carrying out new projects undertaken by the district after the original project for which the district was formed has been completed."

Counsel for the District concludes that, absent contrary judicial determination, there is no present power to tax, under the language of Section 27169, which reads as follows:

"The district may have taxes levied and collected in accordance with the provisions of this part for the purpose of running expenses, organization expenses and the investigation expenses of the district



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before the issuance of bonds, and for the purpose of paying the obligations of the district."

I agree with the conclusion reached by both the Legislative Counsel and Counsel for the District that the Golden Gate Bridge and Highway District has no present power to tax. With reference to the caveat expressed in Mr. Jenkins' opinion "absent contrary judicial determination," this caveat would, of course, be proper in any opinion as no legal officer can predict with certainty what a court's determination would be in the application of the provisions of a statute to a particular factual situation. However, based upon my analysis of these opinions, the statute involved and applicable case law, it appears clear to me that the Bridge District's power to tax terminated upon complete retirement of the bonded indebtedness incurred for the construction of the existing Golden Gate Bridge.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 10, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Necessity of Mailing Notices of Taxes  
Due on Taxpayer's Obligation

Dear Mr. Dolan:

This is in response to your letter dated March 17, 1972, forwarding the request of the Finance Committee of the Board of Supervisors for my opinion concerning cancellation of a property tax penalty imposed for the fiscal year 1971-72 in connection with the property located at 2025 McKinnon Avenue.

Your letter indicated that the taxpayer did not receive a timely notice of taxes due, the notice having been sent to the taxpayer's former address.

Notice to taxpayers regarding property taxes is governed by Revenue and Taxation Code Section 2609, which provides that on or before the day when taxes are payable, notice must be published specifying the dates when taxes on the secured roll are due, when the taxes will be delinquent, the penalties for delinquency, the fact that all taxes must be paid when the first installment is due, and the times and places at which payment is made. Assuming there is no change in assessment, no requirement is imposed that any written notice be mailed to an assessee. The obligation upon the Tax Collector to notify the taxpayer is different and less stringent under the provisions of Section 2609 than is the obligation upon the Assessor to notify an assessee of a change in assessment under Revenue and Taxation Code Section 619. Section 619 requires notification through the United States mail. (Emphasis added.) The requirement of written notice applies only where there is a change in assessed value.

In Miller v. Kern County the court pointed out that this notice, though desirable, is not essential to the validity of the





Mr. Robert J. Dolan

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assessment and the tax. The validity of the tax is not affected by an entire failure to give notice. (137 Cal. 516.)

Revenue and Taxation Code Section 2617 provides as follows:

"All taxes due November 1st, if unpaid, are delinquent December 10th at 5 p.m., and thereafter a delinquent penalty of 6 percent attaches to them."

Section 2617 reveals no language that would justify the Board of Supervisors in relieving a taxpayer from such a situation as here existed. Absent statutory authorization the Board is powerless to relieve delinquent taxpayers from penalties incurred by violations of statutes providing therefor. (Camden Fire Ins. Assn. v. Johnson, 42 C.A.2d 528.)

In this connection the court in the course of its opinion in the aforementioned case stated:

". . . while tax laws are to be construed most strictly against the government and most favorable to the taxpayer, '. . . it is equally well settled that where taxes including interest and penalties are clearly imposed by law, he who would claim an exemption or relief from them, when so legally imposed, must point to clear and unmistakable warrant of law to support his claim; he is entitled to no special privilege over the other taxpayers which is not clearly and definitely established by law.'" (Camden v. Fire Ins. Assn. v. Johnson, supra, at p. 529.)

The Camden case is not substantially different from the instant case and the court further went on to state:

"This is an action to recover a sum assessed for delinquency in the payment of a tax . . . It is admitted that the tax was not paid upon the date required by law, but the pleadings show that the short delay in its payment was the result of a mistake innocently made and which in purely personal relations an honest man would be prompt to relieve against and forgive. But the statute fixes the date of payment and states the exact amount and nature of the penalty . . . in such a case the law



Mr. Robert J. Dolan

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is the measure of the rights of all parties involved, the state and the taxpayer. . . . the penalty provided by the statute, upon its becoming operative, became a part of the tax and thereupon commanded all of the support given to a tax regularly levied for the support of government. . . ." (Camden Fire Ins. Assn. v. Johnson, supra, at p. 530.)

You are accordingly advised that the position of the Tax Collector's attorney is essentially correct and that the taxpayer is not entitled to an abatement of the penalty imposed pursuant to Revenue and Taxation Code Section 2617.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





April 10, 1972

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Mr. Bernard Orsi  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Sex Discrimination in Employment

Dear Mr. Orsi:

This refers to your letter wherein you request an opinion regarding the authority of the Civil Service Commission to limit examinations or certifications to a candidate or eligible of a particular sex and the authority of appointing officers to specify the sex of an employee pursuant to Charter Section 8.329 in conjunction with Section 2 of Civil Service Rule 20.

Section 8.329 of the Charter provides in part as follows:

"Whenever a position controlled by the civil service provisions of this charter is to be filled, the appointing officer shall make a requisition to the civil service commission for a person to fill it. Thereupon, the commission shall certify to the appointing officer, the name and address of the person standing highest on the list of eligibles for such position. In case the position is promotive, the commission shall certify the name of the person standing highest on such list. In making such certification, sex shall be disregarded except when a statute, a rule of the commission or the appointing officer specifies sex."

Section 2 of Rule 20 of the Civil Service Commission provides as follows:

"In all cases where an appointing officer considers that a vacancy in a civil service position



Mr. Bernard Orsi

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April 10, 1972

should be filled by an eligible of a particular sex, he shall so advise the Civil Service Commission at the time of his request, specifying in detail the factual basis for his request.

"After consideration of the matter, the Civil Service Commission may refer the matter back to the appointing officer with its comments for his further consideration. Should the appointing officer, after further consideration, again request that such civil service position be filled by an eligible of a particular sex, such determination will be final except so far as anyone may seek review in the courts."

Formerly Title VII of the 1964 Federal Civil Rights Act specifically excluded "a state or political subdivision thereof" from coverage under the Act. (42 U.S.C. §2000e-(b)(1).) (See Schattman v. Texas Employment Commission, 5th Cir., 1972, \_\_\_\_\_ F.2d \_\_\_\_\_). The Act which was amended in March 1972 (§14, Equal Employment Opportunity Act of 1972) is effective immediately and includes states and political subdivisions thereof (§701, Civil Rights Act of 1964, as amended). Decisions construing the Act concerning exclusion of women from specific positions are now directly in point relative to the authority of appointing officer and Civil Service Commission.

Title VII of Civil Rights Act of 1964 limits the ability of an employer to discriminate between the sexes in hiring to whether "sex . . . is a bona fide occupational qualification necessary to the normal operation of that particular business or enterprise, . . ." [42 U.S.C.A. §2000e-2(e)]. The ability of an employer to discriminate against women in hiring pursuant to the "bona fide occupational qualification" standard of the 1964 Civil Rights Act has been construed in the decision in Weeks v. Southern Bell Telephone & Telegraph Company (1969) 408 F.2d 228, 235, wherein the Court stated:

" . . . We conclude that the principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to





Mr. Bernard Orsi

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perform safely and efficiently the duties of the job involved."

The California Supreme Court in Sail'er Inn, Inc. v. Kirby (May 27, 1971) 5 C.3d 1, struck down Section 25656 of the Business and Professions Code, which prohibited women from tending bar, on grounds that the code section violated Article XX, Section 18 of the California Constitution (declaring that a person may not be disqualified because of sex from entering or pursuing a lawful business, vocation or profession), violated the Equal Protection clauses of the Constitutions of the United States and California, and conflicted with the Federal Civil Rights Act of 1964.

In considering the "bona fide occupational qualification" standard of the Federal Civil Rights Act in conjunction with the decision in Weeks v. Southern Bell Telephone and Telegraph Company, supra, the Court stated:

"Section 2000e-2(a) makes it unlawful to hire or to 'limit, segregate, or classify' employees in any way which would tend to deprive an employee of employment opportunities on the basis of sex. Section 2000e-2(e) permits an exception only where there is a 'bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . .'

"In determining whether prohibiting women from tending bar fall within the bona fide occupational qualification exception to the federal statute, we are necessarily influenced by the guidelines promulgated by the Equal Employment Opportunity Commission. (29 C.F.R. §1604.1.) These guidelines, which are entitled to 'great deference' (Udall v. Tallman (1965) 380 U.S. 1, 16 [13 L.Ed.2d 616, 625, 85 S.Ct. 792]), state that 'assumptions of the comparative employment characteristics' of women in general (29 C.F.R. §1604.1(a)(1)(i) and 'stereotyped characterizations' of the sexes (29 C.F.R. §1604.1(a)(1)(ii)) do not warrant the application of the bona fide occupational qualification exception. Thus, under the guidelines only an individual inquiry into a particular woman applicant's qualifications, or, at most, a clearly justifiable general





Mr. Bernard Orsi

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classification with respect to a particular job category meets the requirements of section 2000e-2.

\* \* \*

"Courts, following the guidelines, have invalidated weight-lifting restrictions for women (*Bowe v. Colgate Palmolive Company* (7th Cir. 1969) 416 F.2d 711; *Richards v. Griffith Rubber Mills*, supra, 300 F. Supp. 388; *Rosenfeld v. Southern Pacific Company*, supra, 293 F.Supp. 1219), hours limitations (*Caterpillar Tractor Co. v. Grabiec* (S.D. Ill. 1970) 317 F. Supp. 1304) and exclusionary job categories (*Weeks v. Southern Bell Telephone & Telegraph Company*, supra, 408 F.2d 228 (switchman); *McCrimmon v. Daley* (E.D. Ill. 1970) 2 F.E.P. Cases 971 (barmaid ordinance).). . ."

The decision in *Sail'er Inn, Inc. v. Kirby*, supra, holds that women cannot be prevented from applying for nor be discriminated against in jobs which require working overtime or jobs which present safety hazards or adverse working conditions by virtue of Article XX, Section 18 of the California Constitution and the Equal Protection Clauses of the Constitutions of California and the United States. See also *Read v. Reed* (1971) U.S.\_\_\_\_\_, 30 L.Ed.2d 225.

You ask specifically whether a job restriction to men only where lifting of weights is required is a valid limitation. With respect to jobs which traditionally have been reserved for men because of weight lifting requirements the Ninth Circuit Court of Appeals in *Rosenfeld v. Southern Pacific Company* (June 1, 1971) 444 F.2d 1219 upheld the U.S. District Court's decision that Section 1251 of the California Labor Code, which limits lifting of weight by women to 50 pounds, and California Industrial Welfare Commission Order No. 9-63, which limits lifting of weights by women to 25 pounds, are violative of Title VII of the 1964 Civil Rights Act.

You are advised that in my opinion Section 2 of Rule 20 of the Civil Service Commission is a valid rule. But the appointing officer cannot specify a particular sex for a position unless the details which form the factual basis for his



Mr. Bernard Orsi

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request meet the standards set forth above. The Civil Service Commission must be satisfied that the request meets these standards or it must refer the request back to the appointing officer with its comments for further consideration by the appointing officer.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





April 10, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Files No. 224-72-1 and 224-72-2;  
Proposed Ordinances Amending Section 148,  
Public Works Code to Change Operative  
Date of Sewer Service Charge from  
September 1, 1971, to November 14, 1971,  
or January 26, 1972

Dear Mr. Dolan:

Your office has submitted two ordinances prepared by the Controller to this office for approval as to form. One ordinance (File No. 224-72-1) amends Section 148 of the Public Works Code to change the operative date set forth therein from September 1, 1971, to November 14, 1971, and the second ordinance (File No. 224-72-2) amends said section to change said operative date from September 1, 1971, to January 26, 1972.

Section 148 was added to the Public Works Code on August 24, 1971, as a part of the Sewer Service Charge Ordinance. (Ord. No. 212-71, adopted August 23, 1971; approved August 24, 1971; Public Works Code, §§ 141-148.) Section 144 of the Public Works Code provides that said sewer service charge shall be collected by the Water Department at the same time and along with the collection of charges for water in accordance with the regular billing practices of the Water Department; that the collection of said charge from each user shall commence with the beginning of the first regular billing period applicable to said user which starts on or after the operative date of the sewer service charge ordinance; i.e., September 1, 1971; that the sewer service charge shall be deemed to be a debt owed to the City; and that any sewer service charge not remitted to the Water Department by a user on or before the due date shall become delinquent and shall result in interest and penalties on the user.



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On September 25, 1971, before any charges imposed by Ordinance No. 212-71 were billed or collected by the Water Department, the Federal Government advised the City and County that the imposition or collection of said charge would be a violation of the provisions of the Economic Stabilization Act of 1970, as amended, and Executive Order No. 11615 (the wage-price freeze). The City and County thereupon suspended operation of the provisions of the ordinance and on October 1, 1971, filed suit in the U.S. District Court for judgment declaring that Executive Order No. 11615 does not apply to the San Francisco sewer service charge or that if it does apply, it is invalid. On December 16, 1971, the City and County filed an application with the Price Commission, Washington, D.C., for permission to proceed with imposition and collection of the sewer service charge as authorized by Ordinance No. 212-71. On January 26, 1972, while action on said application was still pending before the Price Commission, the Cost of Living Council exempted all local governmental sewer service charges from compliance with the stabilization program, and on March 16, 1972, the Price Commission ordered that the City and County be permitted to initiate a sewer service charge as of November 14, 1971.

At the present time the Water Department is billing and collecting a sewer service charge from each user commencing with the beginning of the first regular billing period applicable to each such user which starts on or after January 26, 1972, the date the Cost of Living Council exempted such charges from compliance with the stabilization program. No action has been taken with respect to billing and collection of sewer service charges for any period prior to January 26, 1972.

In the event the Board of Supervisors were to enact the proposed ordinance changing the operative date of the sewer service charge from September 1, 1971, to January 26, 1972 (File No. 224-72-2) the liability of any user for payment for sewer services furnished after September 1, 1971, and prior to January 26, 1972, would be remitted. If the Board of Supervisors were to enact the proposed ordinance changing said operative date to November 14, 1971, the liability of any user for payment for sewer services furnished after September 1, 1971, and prior to November 14, 1971, would be remitted. In any event, enactment of either ordinance as submitted to this office would result in the remission of a debt due and owing to the City and County pursuant to the provisions of a duly enacted ordinance and would, in my opinion, raise a serious question as to the validity of the





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ordinance (Los Angeles County v. Jessup, 11 Cal.2d 273; People v. Schmidt, 48 Cal.App.2d 255).

In the Jessup case, supra, from 1935 until September 1, 1937, a statutory lien was accorded to the counties as security for reimbursement to them for aid granted under the Old Age Security Act of 1929, but on September 1, 1937, by legislative edict all such liens and mortgages were released and the counties authorized and directed to execute and record appropriate instruments of release, whether or not the property continued to be owned by the person who received the aid and whose property had been subject to the lien as security for reimbursement. The Supreme Court held that to release the lien upon properties of persons who were never entitled to aid, such as heirs or grantees of the recipient of the aid, constituted a gift to them of "public money or thing of value" in violation of Section 31 of Article IV of the Constitution. (Now § 25 of Art. XIII.)

In the Schmidt case, supra, the Alcoholic Beverage Control Act of 1935 required the payment of a license fee by beer importers. Shortly after the Act became effective the U.S. District Court enjoined the collection of such license fees. On appeal the U.S. Supreme Court reversed the judgment of the District Court. Demand was thereupon made upon the defendant to pay the fees due under the Act and upon his refusal to pay action was instituted to collect said fees. The Court held said action was proper upon the obligation implied in law by the provisions of the Act. One of the defenses raised by defendant was that any right to collect said license fees was lost by virtue of the repeal in 1937 of the provisions of the Act imposing license fees upon beer importers. In rejecting this defense, the Court stated as follows:

" . . . In effect, this amounts to a contention that the legislature had the power, by repealing said provisions in 1937, to surrender, without consideration, a right which had theretofore vested in the State. We find no merit in this contention as the legislature may not, under the guise of a repeal, violate Section 31 of Article IV of the Constitution. . . ." (48 Cal.App.2d 255, 259.)

However, it is a well-recognized rule of law that the remission of a debt or the expenditure of money by a governmental entity in furtherance of a public purpose does not constitute a gift of public funds. (County of San Bernardino v. Way, 18 Cal.2d



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647; County of Alameda v. Janssen, 16 Cal.2d 276; San Francisco v. Collins, 216 Cal. 187) and the determination of what constitutes a public purpose is primarily a matter for legislative discretion, which will not be disturbed by the courts so long as it has a reasonable basis. (County of Alameda v. Janssen, supra; People v. Standard Acc. Ins. Co., 42 Cal.App.2d 409.)

You are accordingly advised that if the Board of Supervisors find, after hearing and consideration of all the facts relating to the proposed ordinances advancing the operative date of the sewer service charge ordinance, that such action would promote a public purpose, it is my opinion that either of such ordinances may be validly enacted.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 11, 1972

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Board of Permit Appeals  
252 City Hall  
San Francisco, California 94102

Attention of Mr. Philip J. Siggins  
Executive Director

Subject: Jurisdiction of Board of Permit Appeals  
to Hear Protests to Issuance of New  
Taxicab Permits

Gentlemen:

On December 16, 1968, the Police Commission rendered its decision granting 110 certificates of public convenience and necessity for the operation of taxicabs to 90 persons. This decision granting certificates of public convenience and necessity was appealed to the Board of Permit Appeals, together with numerous other appeals by applicants who were denied such certificates. After hearing, the Board of Permit Appeals concurred in the decision of the Police Commission both in the issuance of 110 certificates and the denial of the other applicants. The hearing of the Board was on the issue of public convenience and necessity only.

Thereafter, the protestants to the issuance of certificates of public convenience and necessity filed suit in Superior Court to annul the decision of the Board of Permit Appeals and were denied relief. The decision of the Superior Court was affirmed on appeal in Luxor Cab v. Cahill, 21 Cal.App.3d 551, which decision is now final.

While the litigation was proceeding, the Police Commission permitted those persons who wished to operate taxicabs during the pendency of the litigation to do so. Those persons holding 60 certificates of public convenience and necessity indicated they wished to operate taxicabs. Pursuant to Section 1078 of the Police Code the Police Commission required compliance with other provisions of the Municipal Code and thereupon permits were





Board of Permit Appeals

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issued to the holders of certificates of public convenience and necessity by the Police Department. The issuance of the permits by the Police Department was also appealed to the Board of Permit Appeals, which denied such appeals.

Now that the litigation has terminated, the remaining 50 holders of certificates of public convenience and necessity are proceeding to obtain their permits from the Police Department. Some have been issued and again there are appeals to the Board of Permit Appeals against those issued.

Now, through your Executive Director, Philip J. Siggins, in light of the decision in the Luxor Cab Co. case, supra, you have asked for my opinion in regard to the following questions:

1. Assuming the timely and proper filing of a protest appeal, does the Board of Permit Appeals have jurisdiction to consider said appeal?

Yes. Under Section 1078 of the Police Code, after the Police Commission issues a certificate of public convenience and necessity the Police Department is to issue a license or permit for the operation of the taxicab. Additionally, Section 1.10 of Part III of the Municipal Code provides that the Police Department is the department to issue permits for the operation of vehicles for hire.

Therefore, as it would appear that the appeals presently before your Board are from the issuance of the permits for the operation of motor vehicles for hire, there would be jurisdiction under Charter § 3.651 (formerly § 39) to hear the appeals.

2. If jurisdiction lies, can the issue of public convenience and necessity be determined at this time?

No. The Board of Permit Appeals had already heard this issue and made a determination in the prior appeal on the issuance of the 110 certificates of public convenience and necessity. That determination on that sole issue was litigated by the appellants in Luxor Cab Co. v. Cahill, supra, in which the appellate court found that the Board proceeded properly and that the Board's decision on the question of public convenience and necessity was supported by substantial evidence.

As the decision of the Board on the issue of public convenience and necessity has been upheld by the courts and the



Board of Permit Appeals

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appellate court's opinion is now final, the Board may not reopen the issue on an appeal protesting the issuance of permits by the Police Department.

3. If yes, is it the public convenience and necessity of 1968 or 1972?

As Question No. 2 was answered in the negative, no answer is necessary here.

4. If the appellate decision regarding public convenience and necessity is final, what consideration can be given to other conditions required before the granting of a permit for the operation of a taxicab, or were the conditions also considered by the court and final?

As has been indicated above, the appellate decision considered and decided essentially only the issue of public convenience and necessity and on the present appeal before the Board other matters subsequent to the decisions on that issue could be considered.

Under Section 1078 of the Police Code, the permittee must meet all of the applicable provisions of the Municipal Code and the rules and regulations adopted by the Board of Supervisors and the Police Commission for the operation of taxicabs. Therefore, on the present appeal the Board of Permit Appeals could consider, for example, the question of adequate insurance to meet the requirements of Section 1080-1080.2 of the Police Code, or the protest of a distinctive color assignment as being too similar to an existing one so as to confuse the public as to the operation thereof.

You are so advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





April 17, 1972

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Mr. Wallace Wortman  
Director of Property  
450 McAllister Street  
San Francisco, California 94102

Subject: Dedication of Easement for State Highway  
Purposes--Deed from Buri Buri Homes to  
City--No Present Intention to Dedicate

Dear Mr. Wortman:

As requested I have reviewed the original deed from Buri Buri Homes, Inc. to the City, recorded February 24, 1949, in volume 1627 at page 228, Official Records of San Mateo County.

Although the document grants fee title to deed Parcel 1, consisting of a 54' wide strip of the then existing westerly El Camino Real frontage, the conveyance was made subject to two very significant reservations:

1. The grantor reserved the right to make use of the lands not inconsistent with the use thereof by the City for water pipe lines, provided that no structures may be placed thereon without City's consent.
2. The grantor reserved the right to construct and maintain over, across, and along said parcel of land, fences, roads, streets, sewers, etc., provided that (a) the location and grades of such improvements must first be approved by the City's Public Utilities Commission, (b) the use by grantor must not interfere with, damage or endanger City's pipe lines, and (c) the ground surface of all fills must not exceed 5 feet above the tops of City's pipes.

The conveyance was also made subject to the condition that said Parcel 1 "is to be ultimately





Mr. Wallace Wortman

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used primarily by the general public for highway and/or automobile parking purposes" and that City is prohibited from erecting any structures projecting above the surface of said land.

By virtue of the aforesaid reservations and conditions, it is clear that the City acquired virtually no surface rights whatsoever in Parcel 1, it being clear that the grantor reserved to itself the right to use the surface for any purpose so long as said use was not inconsistent with the use of the subsurface thereof for water pipe lines, provided, however, that no structures could be placed on the property without the City's consent. In other words, by said conveyance the City acquired a fee burdened with a surface easement in favor of the grantor.

However, there is no language in the deed expressing a present intention to dedicate Parcel 1 to the general public for highway purposes. At best, the language in condition No. 3, to wit: "It is understood that said Parcel 1 is to be ultimately used primarily by the general public for highway and/or automobile parking purposes," expresses merely an intention that at some undetermined time in the future the surface of the land may be surrendered to the public use for highway purposes. Said language is not sufficient to constitute an offer of dedication. To have that effect there must be a present offer, not merely a general intention that at some time in the future, the land shall be surrendered for public use (Cerf v. Pfleging, 94 Cal. 131, 135).

However, since the grantor did reserve the right to use the surface of Parcel 1 with the limitation that no structures may be placed thereon without the consent of the City, the grantor could have subsequently conveyed said surface rights to the state for highway purposes. If such is the fact, the state would have the right to use Parcel 1 for highway purposes, provided the City first consented to the placement of any structures, including pavement thereon, and if the state desires to dispense with the requirement of City's consent it can do so only by acquiring an unrestricted easement for that purpose, either by proper conveyance from the City or by eminent domain proceedings against the City.

In conclusion, you are advised that, in the absence of the acquisition of City's limited interest in the surface rights of Parcel 1, either by deed or Judgment in Condemnation, the state has no right to place and maintain structures such as pavement thereon without City's consent.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 20, 1972

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Honorable Dianne Feinstein  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Reduced Rate Municipal Railway  
Tokens for Off-Peak Riders

Dear Supervisor Feinstein:

By letter of April 12 you ask whether it would be legal to provide "reduced rate Municipal Railway tokens to off-peak riders." Secondly, you ask "if it is possible to provide tokens in downtown retail establishments."

The answer to each of your two questions is in the affirmative.

Subject to all of the procedural requirements of Charter Section 3.598, the Public Utilities Commission has the legal authority to fix Municipal Railway fares "at varying scales for different classes of service or consumers." Thereafter, pursuant to the provisions of said Section 3.598, the fare revision would be submitted to the Board of Supervisors for the performance of its role in the charter process.

Secondly, under the managerial power reposed in the Public Utilities Commission by Charter Section 3.591, that commission could permissibly determine that a token system, with sales outlets in downtown retail establishments, would be employed in executing a plan for riding at reduced fares during off-peak hours. Of course, this assumes the willingness of the downtown retail establishments to participate in such a program, under whatever conditions might be proposed by the Public Utilities Commission.

Obviously, the foregoing advice speaks only to the legal issues tendered by you, and does not purport to express views





Honorable Dianne Feinstein      2

April 20, 1972

upon the policy issues suggested by your inquiries.

Should you desire further assistance regarding these matters, please call upon us.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 28, 1972

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Honorable Roger Boas  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Inclusion of Adult and Juvenile Probation  
Officers in Retirement Benefits Applicable  
to Members of the Police Department

Dear Supervisor Boas:

This is in response to your letter dated April 25, 1972, requesting my advice as to the legal steps necessary to place Adult and Juvenile Probation Officers in the same retirement system as members of the San Francisco Police Department.

The San Francisco City and County Employees' Retirement System is composed of three general membership categories; viz., (1) members of the Police Department, (2) members of the Fire Department, and (3) "miscellaneous"; that is, all those members of the Retirement System who are not members of the Police or Fire Departments. The benefit program available to each of these membership categories is set forth in the Charter. Under present Charter provisions, Adult and Juvenile Probation Officers fall within the category of "miscellaneous" members of the Retirement System.

In order to make available to Adult and Juvenile Probation Officers the retirement program presently provided for members of the Police Department, it would be necessary that an appropriate Charter amendment be adopted.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



April 28, 1972

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Mr. Alfred Goldberg, Superintendent  
Bureau of Building Inspection  
Department of Public Works  
450 McAllister Street  
San Francisco, California 94102

Subject: Disposition of Refundable Deposits and Fees  
for Plans and Specifications in FACE Projects

Dear Mr. Goldberg:

You recently wrote me asking what disposition should be made of funds you are holding which were paid to you as a deposit for plans and specifications by various contractors bidding on rehabilitation projects in your Federally Assisted Code Enforcement Program. I understand that the plans and specifications were prepared by your Bureau and copies were prepared and given to contractors who asked to bid on the various projects. The plans and specifications were given to the contractors upon the condition that the contractors pay a deposit which would be returned to the contractors if the plans and specifications were returned on or before a specified date.

You refer in your letter to my prior opinion, No. 69-65, dealing with the disposition of unclaimed deposits paid pursuant to Section 109 of the Public Works Code to cover the estimated cost of opening a street and installing, connecting or repairing a side sewer. In my prior opinion, I advised you that the unclaimed street deposits were to be disposed of pursuant to provisions of Government Code, Sections 50050 through 50053.

The sewer deposits are collected to cover the estimated cost to the City of work to be performed by the City in connection with installing, repairing, or connecting a side sewer. Any portion of the deposit remaining after deducting the actual cost of the work done by the City can be reclaimed by the individual who paid the deposit and such remaining amounts are the property of the individual who had paid the deposit. Accordingly, I





Mr. Alfred Goldberg

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April 28, 1972

advised that those funds should be handled as money which is not the property of the City, pursuant to Government Code Sections 50050 through 50053.

Deposits for plans and specifications are not the same type of deposit as the sewer deposit. The sewer deposit is for an estimate of the cost of work to be done in the future. Any portion of the sewer deposit funds remaining unused is not earned by the City and remains the property of the depositor although remaining in the custody of the City. The deposit for plans and specifications is fully earned by the City when the plans are delivered to the contractor and the contractor fails to return them by the date specified. Perhaps the deposit for plans and specifications could more properly be called a "refundable fee." The fee charged the contractor represents the reasonable cost to the City of reproducing the set of plans and specifications given to the contractor. The refund is made to the contractor if the complete set is returned by a specified date because the complete set could be reused.

Plans and specifications prepared for use on FACE rehabilitation projects would fall within the definition of "public records" as given in Section 6252(d) of the Government Code. Sections 6250 through 6260 were enacted in 1968 and are known as The California Public Records Act.

Section 6257 reads as follows:

"§ 6257. Request for copy; fee

"A request for a copy of an identifiable public record or information produced therefrom, or a certified copy of such record, shall be accompanied by payment of a reasonable fee or deposit established by the state or local agency, or the prescribed statutory fee, where applicable."

Assuming there is no objection from the Department of Housing and Urban Development who funds a major part of the cost of your Federally Assisted Code Enforcement Program, it would appear that you could treat copies of the plans and specifications as public records for which you could charge a reasonable fee or for which you could require a reasonable deposit returnable upon certain conditions.



Mr. Alfred Goldberg

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April 28, 1972

Accordingly, I advise you that you can make a reasonable charge for sets of plans and specifications prepared for contractors wishing to bid on FACE rehabilitation projects. In addition, you may provide for a refund to the contractor if the complete set is returned by a specified date. Finally, any of these deposits or fees now being held by you representing refundable fees collected for sets of plans and specifications not returned are the property of the City and are not subject to disposition pursuant to Section 50050 of the Government Code.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





May 1, 1972

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Honorable Evelle J. Younger  
Attorney General of California  
Department of Justice  
350 State Building  
San Francisco, California 94102

Attention: Mrs. Elizabeth Palmer

Subject: Power of Board of Permit Appeals to  
Order a Permit Issued in Contravention  
of State Law

Dear Mr. Younger:

This is in response to your April 27, 1972, letter in which you refer to "the issuance of a use permit" by the San Francisco Board of Permit Appeals to the Walgreen Drug Store contrary to the provisions of Sections 28821 and 28840 of the Retail Food Production and Establishments Law added to the Health and Safety Code by Statutes 1970, Chapter 649.

You are advised that the Board of Permit Appeals does not have authority to issue a use permit. Its authority under the provisions of Section 3.651 of the Charter is to "concur in the action of the department authorized to issue such license or permit or, by the vote of four members, . . . overrule the action of such department and order that the permit or license be granted, restored or refused."

It has been the consistent position of this office that the Board of Permit Appeals is without power to order a permit issued in contravention of applicable state or local law and that when such action is taken by the Board, the involved administrative official is legally justified in refusing to issue the permit and may proceed to enforce the law in disregard of the Board's void order. See attached opinion of City Attorney, No. 4177, dated August 19, 1948. Also, see the case of Plum v. City of Healdsburg, 237 C.A.2d 308 which held that mandamus will not issue in such case to compel the issuance of the permit as mandamus does not lie to compel performance of acts

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Honorable Evelle J. Younger      2

May 1, 1972

that are void, illegal, contrary to public policy, or that tend to aid in an unlawful purpose.

If in the instant case the facility in question was constructed after the effective date of Chapter 649 of the Statutes of 1970 and it sells food in packages or otherwise, it would appear that the pertinent requirements of Sections 28821 and 28840 of the Health and Safety Code would be applicable and neither the Board of Permit Appeals nor the Department of Public Health would have power or authority to waive these requirements. However, I would not be in a position to render an opinion on the factual and evidentiary matter presented before the Board of Permit Appeals unless I were furnished with a transcript of the proceedings conducted by the Board.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



May 5, 1972

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Donald M. Scott, Chief  
San Francisco Police Department  
850 Bryant Street  
San Francisco, California 94103

Subject: Legality of Transfer of Accumulated  
Overtime from One Employee to Another

Dear Chief Scott:

In response to your letter of May 1, 1972, requesting my opinion as to the legality of transfer of accumulated overtime from one officer to another, I submit the following:

Section 8.405 of the San Francisco Charter provides in part that:

"Working benefits and premium pay differential of any type shall be allowed or paid to members of the police department referred to herein only as otherwise provided by this charter."

Section 8.451 of the Charter establishes the procedures for compensating police officers working overtime and makes no provision for overtime transfer such as you suggest. Furthermore, Section 8.400(g) of the Charter states in part:

"No officer or employee shall be paid for a greater time than that covered by his actual service; . . ."

It is clear that, upon the basis of the above quoted Charter provisions, transfer of overtime credit from one officer to another would be illegal.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





May 8, 1972

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Mr. James F. Wurm  
Assistant General Manager, Personnel  
Civil Service Commission  
Room 151, City Hall  
San Francisco, California 94102

Subject: Authority of Civil Service Commission  
to Restore Temporary Employees After  
Termination by Department Heads

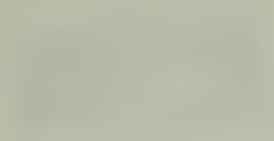
Dear Mr. Wurm:

This is in response to your recent letter in which you ask for an opinion on the authority of the Civil Service Commission to adopt a rule whereby temporary employees who have been terminated may be restored to the position from which they were terminated by action of the Civil Service Commission.

Temporary employees are terminated pursuant to Section 3.501 (formerly Section 20) of the Charter by the following language contained in that section:

"Non-civil service appointments and any temporary appointments in any department or subdivision thereof, and all removals therefrom shall be made by the department head or bureau head designated as the appointing officer only with the approval of the chief administrative officer or the board or commission in charge, as the case may be."

This section does not provide for the approval or disapproval of the termination by the Civil Service Commission nor is there any appeal to the Civil Service Commission afforded the employee. The terminated employee's administrative remedies are exhausted at the level of the Chief Administrative Officer or the board or commission involved. Any further remedy is in the courts.



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Mr. James F. Wurm

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May 8, 1972

The Civil Service Commission in adopting rules to carry out the civil service provisions of the Charter may not adopt a rule which is in conflict with the Charter. (See Charter Section 3.661, formerly Section 141.)

The court in interpreting a city charter section (145.1) on the termination of a limited tenure employee stated:

"The judicial function is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." McGill v. City and County of San Francisco (1964) 231 C.A.2d 35.

You are advised that in the termination of a noncivil service or temporary appointee the Civil Service Commission has no right of review and cannot confer such a right on itself by promulgating a rule. In those terminations the review must be made by the Chief Administrative Officer or the Board or commission involved.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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May 8, 1972

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Mr. John D. Crowley  
General Manager of Public Utilities  
287 City Hall  
San Francisco, California 94102

Subject: Hetch Hetchy: Amendment or Repeal of  
Appropriation Ordinances; Use of Funds

Dear Mr. Crowley:

This is in response to your May 3, 1972, letter in which you request my opinion on the following questions:

a. Can the Mayor or the Board of Supervisors disappropriate funds that are currently appropriated and to be used for a future legitimate purpose without the concurrence of the Public Utilities Commission?

b. Is there any legal constraint to the Public Utilities Commission voluntarily disappropriating Hetch Hetchy funds for the purpose of declaring them excess and available to the General Fund?

(a) Section 2.300 of the Charter provides that "Any ordinance may be amended by an ordinance amending or repealing the particular sections thereof . . ." This power in the Board, plus their budgetary powers under the provisions of Sections 6.205 and 6.306 of the Charter, constitute authority of the Board of Supervisors to amend or repeal appropriations made by the annual or supplemental appropriation ordinances where the funds are unused and are appropriated for a future purpose which is not mandated by law.

A further Charter recognition of the power of the Board of Supervisors to amend or repeal appropriations is contained in Section 6.302, which provides in part as follows:



Mr. John D. Crowley

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"Each sum so recorded shall be an encumbrance for the purpose certified until such obligation is fulfilled, cancelled or discharged, or until the ordinance or resolution is repealed by the Board of Supervisors."

The foregoing amendatory and repealing powers over appropriations in the Board of Supervisors do not require the concurrence of the department involved.

(b) The power to make or amend or repeal appropriations is vested in the Board of Supervisors by the Charter as above noted, and the Public Utilities Commission does not have the power to voluntarily disappropriate funds by its own action. Further, the appropriation of the receipts of the Hetch Hetchy utility must be made in the order specified in Section 6.407 of the Charter; and if the Board of Supervisors repeals or amends an appropriation made for the Hetch Hetchy project, the funds released by such action would have to be allocated to the purposes of this particular utility in accordance with the provisions of subdivision (d) of Section 6.407. These provisions would preclude any transfer of the particular utility funds to the general fund unless they resulted in the accumulation of a surplus which could be transferred by the Board of Supervisors to the general fund under the following provisions of subdivision (e) of Section 6.407:

"If any accumulation in the surplus fund of any utility shall, in any fiscal year, exceed twenty-five percent of the total expenditures of such utility for operation, repairs and maintenance for the preceding fiscal year, such excess may be transferred by the board of supervisors to the general fund of the city and county, and such amount shall be deposited by the commission with the treasurer to the credit of such general fund."

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

The first of the series of lectures was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience.

The second lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience.

The third lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience. The fourth lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience. The fifth lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience. The sixth lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience. The seventh lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience. The eighth lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience. The ninth lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience. The tenth lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience.

The eleventh lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience. The twelfth lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience. The thirteenth lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience. The fourteenth lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience. The fifteenth lecture was given by the Rev. Mr. [Name] on the subject of the [Topic]. It was a most interesting and instructive discourse, and was well received by the audience.

Printed by [Name]

London: [Name]



May 10, 1972

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Honorable Robert H. Mendelsohn  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Senate Bill 51 (1971) and Automobile Service  
Stations in San Francisco

Dear Supervisor Mendelsohn:

This responds to your inquiry as to whether gas stations that seek to be licensed under the provisions of Senate Bill 51 would be faced with the same building and zoning code legislations that now apply.

The bill amends the Business and Professions Code to establish a Bureau of Automotive Repair within the Department of Consumer Affairs (§101 Bus. & Prof. Code) and vests in the bureau the duty of registering automotive repair dealers (§9884). An "automotive repair dealer" is defined as "one who, for compensation, engages in the business of repairing or diagnosing malfunctions of motor vehicles" (§9880.1). The Director of the Bureau of Automotive Repair may invalidate a dealer's registration when it is established that the dealer engaged in certain unauthorized business practices (§9884.7). The bill also provides sanctions for parties who violate any provisions (§§9889.20 and 9889.21).

The bill does not distinguish "garages" from "service stations." It only provides that some minor services customarily performed by gasoline service stations will not be considered "repairs of motor vehicles" within the meaning of the statute.

The bill is clearly intended to provide consumer protection. The bill contains no provisions regulating the type of structure housing the automotive repair dealers.



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Honorable Robert H. Mendelsohn 2

May 10, 1972

By this recent legislation, the state has not entered the field occupied by the City and County of San Francisco Building and Planning Codes. It is therefore my opinion that the application of these codes to garages and automobile service stations is not altered by Senate Bill 51.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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May 12, 1972

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Mr. S. Myron Tatarian  
Director of Public Works  
260 City Hall  
San Francisco, California 94102

Subject: Bicycle Lanes. File #34

Dear Mr. Tatarian:

This is in reply to your request for an opinion as to whether an ordinance of the Board of Supervisors would be required for the establishment of bicycle lanes or whether the Director of Public Works could simply designate such lanes on City streets.

Vehicle Code Section 21207 provides:

"This chapter does not prevent any city from establishing, by ordinance, bicycle lanes separated from any vehicular lanes upon highways . . . and from regulating the operation, and use of bicycles and vehicles with respect to such bicycle lanes."

Vehicle Code Section 21206 states:

"This chapter does not prevent local authorities, by ordinance, from regulating the operation, use, licensing, or equipment of bicycles, provided such regulation is not in conflict with the provisions of this code."

The law is very clear in this state in holding that the general law prevails over local enactments of a chartered city if the subject matter of the general law is of statewide concern (Healy v. Industrial Accident Commission, 41 Cal.2d 118, 122).

In reviewing the provisions of the California Vehicle Code, Sections 21200-07, it is evident that the state legislature

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Mr. S. Myron Tatarian

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May 12, 1972

intended to enact a comprehensive system relating to the operation of bicycles on roadways, a matter considered to be of statewide concern. The state has indicated that a city may by ordinance establish bicycle lanes. Since the legislature has directed the manner in which bicycle lanes be established, the Board of Supervisors must do so by ordinance.

Supervisor Molinari has requested that the City Attorney's office review the legislation of the City of Davis applicable to bicycle lanes.

An ordinance providing for a general system of bicycle lanes has been drafted by the office of the City Attorney and submitted to the Board of Supervisors, a copy of which is attached for your review.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

Encl.

cc: Donald M. Scott, Chief  
San Francisco Police Department

Mr. Robert J. Dolan, Clerk  
Board of Supervisors



May 22, 1972

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Mr. R. Spencer Steele  
Zoning Administrator  
Department of City Planning  
100 Larkin Street  
San Francisco, California 94102

Subject: Board of Permit Appeals  
No. V-6143  
1517-23 Seventh Avenue

Dear Mr. Steele:

This is in response to your May 10, 1972, letter requesting my advice on the question of insufficient supporting evidence to sustain the decision of the Board of Permit Appeals in the above captioned appeal. Included in your letter are considerable arguments and factual allegations and attached thereto are photographs of properties surrounding the subject property.

Under the provisions of Sections 7.503 and 3.651 of the Charter, the Board of Permit Appeals is constituted as the administrative appellate body to consider appeals from variance decisions of the Zoning Administrator. Nowhere in the Charter is the City Attorney constituted a further appellate department from the Board of Permit Appeals with the power to hear and adjudicate a case, and the only further appellate review of a decision of the Board of Permit Appeals provided by law is in the courts.

Nonetheless, in view of the provisions of Section 3.401 of the Charter that I give my opinion or advice in writing to officers of the City and County when requested, upon your request when you furnish me a transcript of the proceedings, I review the record of the proceedings to determine whether in my opinion the Board of Permit Appeals in a particular case has acted in excess of its legal powers. In making such review I am guided by the same principles as would guide a court in reviewing the proceedings and I issue my opinion based on my judgment as to what a court would decide in its review of the proceedings. In arriving at

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Mr. R. Spencer Steele

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May 22, 1972

such judgment, I confine my consideration as would a court to the evidence presented before the Board of Permit Appeals, and the rights and position of your department, as well as the rights of the appellant and the rights and powers of the Board of Permit Appeals, which is the Charter-created tribunal to adjudicate such matters, are thoroughly considered. I accordingly disregard any arguments or factual allegations made outside the record before the Board of Permit Appeals and my opinion on this case is predicated solely on such record.

Section 305(c) of the Planning Code provides that a variance may only be granted by the zoning administrator or by the Board of Permit Appeals upon review upon a finding that the following five conditions specified in Section 305(c) have been satisfied:

- "1. That there are exceptional or extraordinary circumstances applying to the property involved or to the intended use of the property that do not apply generally to other property or uses in the same class of district;
- "2. That owing to such exceptional or extraordinary circumstances the literal enforcement of specified provisions of this Code would result in practical difficulty or unnecessary hardship not created by or attributable to the applicant or the owner of the property;
- "3. That such variance is necessary for the preservation and enjoyment of a substantial property right of the subject property, possessed by other property in the same class of district;
- "4. That the granting of such variance will not be materially detrimental to the public welfare or materially injurious to the property or improvements in the vicinity; and
- "5. That the granting of such variance will be in harmony with the general purpose and intent of this Code and will not adversely affect the Master Plan."



The first of the year was a very successful one for the school. The pupils were very diligent and the teachers were very kind. The school was very well attended and the pupils were very happy. The teachers were very kind and the pupils were very diligent. The school was very well attended and the pupils were very happy.

The second of the year was also a very successful one. The pupils were very diligent and the teachers were very kind. The school was very well attended and the pupils were very happy. The teachers were very kind and the pupils were very diligent. The school was very well attended and the pupils were very happy.

The third of the year was also a very successful one. The pupils were very diligent and the teachers were very kind. The school was very well attended and the pupils were very happy. The teachers were very kind and the pupils were very diligent. The school was very well attended and the pupils were very happy.

The fourth of the year was also a very successful one. The pupils were very diligent and the teachers were very kind. The school was very well attended and the pupils were very happy. The teachers were very kind and the pupils were very diligent. The school was very well attended and the pupils were very happy.

The fifth of the year was also a very successful one. The pupils were very diligent and the teachers were very kind. The school was very well attended and the pupils were very happy. The teachers were very kind and the pupils were very diligent. The school was very well attended and the pupils were very happy.

The sixth of the year was also a very successful one. The pupils were very diligent and the teachers were very kind. The school was very well attended and the pupils were very happy. The teachers were very kind and the pupils were very diligent. The school was very well attended and the pupils were very happy.

The seventh of the year was also a very successful one. The pupils were very diligent and the teachers were very kind. The school was very well attended and the pupils were very happy. The teachers were very kind and the pupils were very diligent. The school was very well attended and the pupils were very happy.

Mr. R. Spencer Steele

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May 22, 1972

From my review of the record in this case, it is my conclusion that there was no substantial evidence presented that would support a finding that the first three of the above enumerated conditions have been satisfied. I accordingly do not find it necessary to make a determination with reference to the last two conditions.

The mere fact that nonconforming structures of greater density exist in the same area and that the size of the subject lot is greater than that of other lots in the area is not sufficient, in my opinion, to justify a finding that conditions 1, 2 and 3 have been satisfied either when considered alone or in conjunction with the fact that the proposed use of the property constitutes its most efficient use, as found by the Board of Permit Appeals. (See Cow Hollow Improvement Club v. Board of Permit Appeals, 245 Cal.App.2d 169.)

The finding of the Board that the proposed use of the property was its most efficient use could relate to economic hardship which is, of course, a relevant consideration under all three of the conditions 1, 2 and 3 set forth above. In this connection, the court in the case of Broadway, Laguna Etc. Assn. v. Board of Permit Appeals, 66 Cal.2d 767 enunciated the guiding considerations as follows (p. 775):

"We recognize that virtually any circumstance which would lead a commercial real estate developer to seek a variance may ultimately be translated into economic terms: the developer attempts to obtain relief from a particular zoning provision in order to augment the earning power or the market value of his property. We must be careful to distinguish, however, between those circumstances which prevent a builder from profitably developing a lot within the strictures of the planning code and those conditions which simply render a complying structure less profitable than anticipated. If conditions which merely reduce profit margin were deemed sufficiently 'exceptional' to warrant relief from the zoning laws, then all but the least imaginative developers could obtain a variety of variances, and the 'public interest in the enforcement of a comprehensive zoning plan' (County of San Diego v. McClurken (1951) 37 Cal.2d 683, 690 [234 P.2d 972]) would inevitably yield to the private interest in the maximization of profits.



Mr. R. Spencer Steele

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"Keeping in mind this fundamental difference between circumstances which prevent a variance applicant from economically developing his property and those which simply reduce his expected earnings, we note . . ." (Also see the discussion by the Court in the Cow Hollow Improvement Club case, supra, pp. 179, 180.)

The only evidence in the Board of Permit Appeals' record relating to economic hardship is contained on page 11, lines 7 to 14, as follows:

"Mr. DeMartini is the contractor. He knows the price of putting these things up. If he were to build eight units--we're dealing with a Code in 1964. Since then we have had tremendous inflation of materials and construction. The borrowing of money, your labor costs, everything has gone up. The only way he can come out of this, he has to go above this eight units, still keeping within the standards of the neighborhood."

I do not consider that this is evidence of sufficient substantiality to justify a finding that a variance allowing fifteen units to be constructed on the subject lot, which would be the result of the variance granted by the Board of Permit Appeals, is necessary to enable to builder to profitably develop his lot. Actually, such a finding would seemingly be negated in the record itself by the applicant's expressed willingness to amend his plans to construct a twelve unit structure on the premises.

You also ask my advice in the contingent event that a building permit application is received in your department for the development on this site of a twelve unit multiple dwelling. My foregoing observations with reference to the substantiality of the evidence in the record on this appeal to support a variance for a fifteen unit multiple dwelling would be equally applicable to a twelve unit multiple dwelling. However, if an application is made for a variance to construct a twelve unit multiple dwelling on the site, that application would have to be considered in the light of the facts adduced in connection with such application and, if an appeal be made to the Board of Permit Appeals, in the light of the record adduced before the Board of Permit Appeals on that particular appeal. I accordingly express no opinion on the propriety of granting a







Mr. R. Spencer Steele

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May 22, 1972

variance to construct a twelve unit multiple dwelling on the subject site.

In this case, it is my conclusion that the facts and reasons for granting the variance as set forth in the Board of Permit Appeals' decision and order of September 13, 1971, are legally insufficient on their face to support a finding of the existence of the five conditions specified in Section 305(c) of the Planning Code and that the record confirms their legal inadequacy.

You are accordingly advised that it is my opinion that the Board of Permit Appeals acted in violation of the powers conferred on it in issuing its September 13, 1971, order and that its action thus taken is void and not binding on your department or the Central Permit Bureau.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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May 23, 1972

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Mr. Philip J. Kearney  
Executive Director  
Health Service System  
450 McAllister Street  
San Francisco, California 94102

Subject: Eligibility of Employees of  
Redevelopment Agency for Membership  
in Health Service System

Dear Mr. Kearney:

This is in response to your request for my opinion as to whether employees of the San Francisco Redevelopment Agency are eligible for membership in the Health Service System.

The basic provisions governing the Health Service System are set forth in the Charter. (§§172.1 through 172.1.15.) The basic requirements for eligibility for membership in the Health Service System are that the individual be (1) an employee of the City and County of San Francisco, the San Francisco Unified School District, the San Francisco Community College District or of the Parking Authority of the City and County of San Francisco, and (2) a member of the San Francisco City and County Employees' Retirement System. (Charter, §172.1; see City Attorney's Opinion No. 63-3, dated February 7, 1963.) A person satisfying these basic requirements becomes a member of the Health Service System unless he is entitled to claim an exemption from such membership and does, in fact, exercise such claim of exemption.

The San Francisco Redevelopment Agency is "a public body, corporate and politic." (Health & Saf. Code, §33100.) It is an entity separate and distinct from the City and County of San Francisco, the Unified School District, the San Francisco Community College District and the Parking Authority. Its employees are not members of the San Francisco City and County Employees' Retirement System. Consequently, employees of the Redevelopment Agency do not meet either of the basic requirements for eligibility for membership in the Health Service System.

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Mr. Philip J. Kearney

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May 23, 1972

I note that Section 172.1.8, subsection (e), empowers the Health Service Board to make rules and regulations for:

" . . . the admission to the system of persons who are hereby made members thereof and such other officers and employees as may voluntarily become members of the system with the approval of the health service board." (Emphasis added.)

Persons becoming members of the Health Service System pursuant to the foregoing underlined language are designated "voluntary" members. (See Rules and Regulations, Part II, A-1.) In accordance with this provision, persons who are not members of the San Francisco City and County Employees' Retirement System may become "voluntary" members of the Health Service System with the approval of the Health Service Board, but only if they are officers or employees of the City and County, Unified School District, Community College District or Parking Authority. (See Rules and Regulations, Part II, A-1; and also City Attorney's Opinion No. 3750, dated January 22, 1946.) Consequently, employees of the Redevelopment Agency are not eligible to be "voluntary" members of the Health Service System.

In conclusion, therefore, you are advised that officers and employees of the San Francisco Redevelopment Agency are not eligible for membership in the Health Service System.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



UNITED STATES DEPARTMENT OF THE ARMY

OFFICE OF THE ADJUTANT GENERAL

WASHINGTON, D. C. 20315

MEMORANDUM FOR THE ADJUTANT GENERAL

SUBJECT: [Illegible]

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May 31, 1972

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Mr. Bernard Orsi  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Salaries of Noncertificated Employees  
of Board of Education are Fixed  
Pursuant to Charter Section 5.101

Dear Mr. Orsi:

This is in response to your letter of May 25, 1972, in which you request an opinion as to the application of Charter Section 5.101 (formerly §135) to fixing salaries of noncertificated employees of the Board of Education.

The pertinent language of Charter Section 5.101 is quoted as follows:

"Non-teaching and non-technical positions, and positions not required by law to be filled by a person holding a teaching or other certificate as required by law, shall be employed under the civil service provisions of this charter and the compensations of such persons shall be fixed in accordance with the salary standardization provisions of this charter."

The language of the Charter section quoted above makes it clear that noncertificated employees are subject to the salary standardization provisions of the City Charter.

Section 13601 of the Education Code of the State of California provides as follows:

"The governing board of any school district, including city boards, shall fix and order paid the compensation of persons a part of the

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Mr. Bernard Orsi

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May 31, 1972

classified service and other employees not requiring certification qualifications employed by the board unless otherwise prescribed by law."  
(Emphasis added.)

The Education Code further provides in Section 13756 as follows:

"In every \* \* \* school district coterminous with the boundaries of a city and county, employees not employed in positions requiring certification qualifications shall be employed, if the city and county has a charter providing for a merit system of employment, pursuant to the provisions of such charter providing for such system and shall, in all respects, be subject to, and have all rights granted by, such provisions; provided, however, that the governing board of the school district shall have the right to fix the duties of all its noncertificated employees."

Education Code Sections 13601 and 13756 (quoted supra) constitute direct authority for the language contained in Charter Section 5.101 (supra).

Section 13601 states that the governing board of the school district fixes the compensation of classified employees unless otherwise prescribed by law. The fixing of compensation for classified employees is otherwise prescribed by law; i.e., Charter Section 5.101. In Ex Parte Sparks, 120 Cal. 395, the Court, in determining what a charter is, stated: "It is clear that it is made a law by the legislature, and becomes a law by this expression of the sovereign will of the state. It prevails and has force as a law of the state, and is not made a law by the people of the municipality by virtue of authority delegated to them. It is proposed by the municipality, and is accepted and passed into a law by the legislature or rejected, as it shall see fit." See also Whitmore v. Brown, 207 Cal. 473, where the Court held that "notwithstanding the fact that the school system is of general concern and not strictly speaking a municipal affair, nevertheless it may be made such an affair by the city when acting in promotion and not in derogation of the legislative school plans and purposes of the state. . . . We should also contemplate the fact that charters promulgated under the constitution as freeholders' charters have all the dignity of ordinary statutes."

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Mr. Bernard Orsi

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May 31, 1972

Section 13601 in stating "unless otherwise prescribed by law" does not limit its meaning in any way and since the charter of a city has all the dignity of a statute and is made a law by the legislature it follows that Charter Section 5.101 is a law which otherwise prescribes the manner in which the compensation of classified personnel is fixed in the City and County of San Francisco.

The Education Code (§13756, supra) makes classified personnel of the school district subject to the merit system of the charter and reserves only the right in the school district to fix their duties.

There is no judicial interpretation in California of the phrase "merit system." The Education Code of California does not define "merit system," but it does have a chapter entitled Merit System (Art. 5 of ch. 3 of Division 10). This article deals with compensation of classified employees in Section 13719 which provides that a commission recommends to the governing board the salary schedules in much the same manner as the City's Civil Service Commission recommends salaries to the Board of Supervisors.

Section 13756 (supra) is included in the chapter of the Education Code on the merit system. This section provides that classified employees are subject in all respects to the merit system provided in the San Francisco Charter. The section further states that an exception to being subject to the merit system is the fixing of duties to remain in the governing board of the school district.

Both Section 13756 and Section 13601 must be construed along with Charter Section 5.101. Since both sections of the Education Code are state statutes and the Charter Section has the dignity of a state statute, effect must be accorded to all three statutes so that they may be harmoniously interpreted. There is no conflict between the three statutes. Section 13601 makes the exception to the school board setting salaries by stating that compensation is not set by the school board if otherwise prescribed by law; i.e., Charter Section 5.101. Section 13756 relates specifically and solely to the City and County of San Francisco and when it refers to the "merit system," it should be construed to include the fixing of compensation pursuant to the Charter section. Charter Section 5.101 (formerly §135) was enacted prior to present Section 13756. If the Legislature



Mr. Bernard Orsi

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May 31, 1972

intended to nullify the authority given the City under the Charter, it would have included the fixing of compensation along with the fixing of duties as within the power of the governing board of the school district.

As stated above, the merit system is not easily defined. The facts and circumstances of each system would determine what is meant to be included. In the San Francisco Charter the so-called salary standardization procedure is a major part of the City's civil service system. The Civil Service Commission collects the data and makes the recommendations upon which salaries are based for all miscellaneous employees. This procedure also provides for increments based upon the length of time in a particular classification. It is my opinion that the fixing of compensation is part of the merit system under the San Francisco Charter in the circumstances present herein.

You are therefore advised that Charter Section 5.101 is valid and not in conflict with state law and that noncertificated employees are subject to salary standardization.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





June 2, 1972

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Mr. Allan B. Jacobs  
Director of Planning  
Department of City Planning  
100 Larkin Street  
San Francisco, California 94102

Subject: Initiative Ordinance Relating to  
Height Limits

Dear Mr. Jacobs:

This is in response to your request for an opinion with respect to certain aspects of the initiative measure appearing on the June 1972 ballot as Proposition "P." You request an opinion as to whether the adoption of Proposition "P" would have the following results:

1. Eliminate the existing height limits of 30 and 35 feet for R-1-D and R-1 Zoning Districts, thereby increasing the limits for these districts to 40 feet; and
2. Include no height limits for Public Use Zoning Districts throughout the City.

The initiative Proposition "P" is as follows:

"A ZONING ORDINANCE LIMITING THE HEIGHT OF  
BUILDINGS IN SAN FRANCISCO.

"Be it ordained by the People of the City and  
County of San Francisco:

"Section 1. Section 121 of the City Planning  
Code is hereby amended to read as follows:

"(a) For the purposes of this Section:

- (1) The 'downtown area' is defined  
as that part of the City zoned



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THE UNIVERSITY OF CHICAGO

August 22 1952

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

*(continued)*

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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• *Journal of the American Medical Association*, 2000; 283: 2639-2642

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1. The first group of people who are not in the labor force are those who are not in the labor force because they are not in the labor force.

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*[Faint, illegible handwritten notes]*

Mr. Allan B. Jacobs

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June 2, 1972

according to Section 105 of this Code as 'C-3 Downtown,' as of October 10, 1970;

- (2) The 'residential area' is defined as that part of the City not included in the 'downtown area,' whether elsewhere labeled in this Code as industrial, commercial or residential.
- "(b) After the effective date of this section, no building permit shall be issued, nor shall any application for a building be finally approved by any administrative agency, unless,
- (1) In the downtown area the building or structure does not exceed one hundred sixty (160) feet in height;
  - (2) In the residential area the building or structure does not exceed forty (40) feet in height.
- "(c) The height limitations in this Section shall not be subject to exceptions, variances or amendments, except by a referendum.
- "(d) This Section shall not be construed to invalidate lower height limits in Article 2.5 of this Code, nor shall it be construed to restrict legislation pertaining to future height limits lower than those specified in subsection (b).
- "(e) If any part of this ordinance is held invalid by a court of law, or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the other parts of the ordinance or applications of this ordinance which can be given effect without the invalid part or applications, and to this end the sections of this ordinance are separable."



Mr. Allan B. Jacobs

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June 2, 1972

Section 121 of the City Planning Code in effect at the present time provides:

"Height Limitations in Use Districts. In any R-1-D, R-1, or R-2 district, a church, school, hospital, institution or permitted public building may be built to a height of seventy-five (75) feet, and to a greater height if the width of any required side yards, and the depth of any required rear yard exceed the minimum requirements set forth in Sections 132 through 134 by one (1) foot for each one (1) foot of such additional height. In other districts the height of such buildings may exceed seventy-five (75) feet, if all other requirements of this Code are met. Except as provided herein, no building in any R-1-D or R-1 district shall exceed thirty-five (35) feet in height. No dwelling in any R-2, R-3 or R-3.5 district, or upon any lot in a C-1 or C-2 district which adjoins any R-1-D, R-1, R-2, R-3 or R-3.5 district shall exceed forty (40) feet in height. In any R-1-D, R-1 or R-2 district, the permitted height shall be reduced to thirty (30) feet for a dwelling on any lot where the average ground elevation at the rear line of the lot is lower by twenty (20) or more feet than at the front line thereof, and shall be increased to forty (40) feet for a dwelling on any lot where there is an equivalent or greater slope upward from the front lot line."

An amendatory ordinance, whether it be by initiative or by action by the Board of Supervisors, does not purport to repeal an ordinance, or section of an ordinance, as it previously existed, but rather changes or amends it to read as stated in the amendatory enactment. Specifically, Section 1 of the proposed initiative ordinance states: "Section 121 of the City Planning Code is hereby amended to read as follows:" and for this reason, the present language found in Section 121 would be changed by the operative language to read as the proposal indicates. If adopted as it presently reads, Section 121(b)(2) would have the effect of raising height limits in R-1-D and R-1 Zoning Districts from a maximum of 30 to 35 feet to a maximum of 40 feet in height. It would require both Planning Commission's and Board of Supervisors' action to restore the previous height limits pursuant to the provisions of Section 121(d) of the initiative measure.







Mr. Allan B. Jacobs

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June 2, 1972

The second question relates to height limitation within Public Use Zoning Districts throughout the City. A Public Use District (P District) is one of the five general use districts into which the City and County is divided under the Planning Code. The other use districts are Residential (R Districts) in seven subcategories, Commercial (C Districts) in 10 subcategories, Industrial (M Districts) in two subcategories, and Public Use Districts (P Districts) (Planning Code §104.) Sections 234, 234.1 and 234.2 of the Planning Code define P Districts and provide for permitted uses in P Districts, including government buildings, schools, churches, child care centers, community club houses, community garages and utility installations.

The 75 foot height limitation for the Public Use Districts' buildings now contained in Section 121 would be terminated by the amendment to the provisions of the section set forth in the initiative measure. The language of the initiative measure is subject to the interpretation that a height limit in P Districts is not provided for in the initiative measure. The sentence which defines "residential area," as set forth in Section 121a(2) of the initiative measure states that "residential area" is that part of the City not included in the "downtown area," and also contains a further qualifying clause as follows: "whether elsewhere labeled in this Code as industrial, commercial or residential." Public Use Districts (P Districts) are omitted from the definition.

The general rule of law in California is that the State and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities are included expressly within the limitation. (See C. J. Kubach v. McGuire, 199 Cal. 215, 217.) In the Kubach case, supra, the Supreme Court of California held that a height limit in the Charter of the City of Los Angeles would not apply to the construction of a new City Hall in excess of the height limit specified in the City Charter. (See also Lombardy v. Peter Kiewit Sons' Co., 266 Cal.App.2d 599, 604.)

At the very least, therefore, the language of the initiative is unclear as to its effect on height limits in Public Use Districts in San Francisco. The language in the initiative does not specifically and categorically include Public Use Districts and, under the general rule of a statutory construction as noted above, Public Use Districts may have been excluded by necessary interpretation of the section.

Page 1, 1955

Page 1, 1955

The following information was obtained from the files of the Department of Defense, Office of the Secretary of Defense, and the Office of the Assistant Secretary of Defense for Policy and Planning. It is being furnished to you for your information and use. It is not to be distributed outside your office without the express approval of the Department of Defense.

The following information was obtained from the files of the Department of Defense, Office of the Secretary of Defense, and the Office of the Assistant Secretary of Defense for Policy and Planning. It is being furnished to you for your information and use. It is not to be distributed outside your office without the express approval of the Department of Defense.

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Mr. Allan B. Jacobs

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June 2, 1972

You are advised that the initiative Proposition "P" would eliminate the existing height limits in R-1-D and R-1 Zoning Districts and could be construed to eliminate height limits for Public Use Zoning Districts throughout the City.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

572 100 - 1000



June 5, 1972

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Mr. William L. Becker  
Director, Human Rights Commission  
1095 Market Street  
San Francisco, California 94103

Subject: Power of Human Rights Commission  
to Establish 50 Per Cent Residency  
Preference as an Affirmative  
Action Program

Dear Mr. Becker:

You requested advice from this office concerning the power of the Human Rights Commission to establish a 50 per cent preference as an affirmative action program for public works projects in the Bay View-Hunter's Point Area. You have further informed me that such an affirmative action program has been set forth in the "Memorandum of Agreement" of November 25, 1970, between the Associated General Contractors of California, Inc., the San Francisco Building and Construction Trades Council, AFL-CIO, and the Bay View-Hunter's Point Model Neighborhood Agency.

I have reviewed the nondiscrimination provisions of the Human Rights Ordinance. Section 12B4(a) specifically empowers the Human Rights Commission to require bidders to submit affirmative action programs which meet the requirements of the Commission. The anticipated 50 per cent residency preference for employment on public works contracts performed in the Bay View-Hunter's Point Area qualifies as an affirmative action program authorized by the above-mentioned ordinance. I am sending copies of this letter to Mr. Tatarian and Mr. Mellon in order that you may arrange with them for immediate notification of all prospective bidders.

I am also informed by the Department of Public Works that the same question has arisen regarding the contemplated construction of a firehouse in the Bay View-Hunter's Point Model City Area. This opinion should resolve any questions regarding that project.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



June 1, 1972

Dr. William E. Miller  
Director, House Select Committee  
on Assassinations  
Washington, D.C. 20540

Subject: Report of the Committee  
on Assassinations  
on the Assassination  
of President John F. Kennedy

Dear Mr. Director:

I am writing to you today to express my appreciation for the report of the Committee on Assassinations on the Assassination of President John F. Kennedy. I am sure that the report will be a valuable contribution to the understanding of the events of that day. I am sure that the report will be a valuable contribution to the understanding of the events of that day. I am sure that the report will be a valuable contribution to the understanding of the events of that day.

I am sure that the report will be a valuable contribution to the understanding of the events of that day. I am sure that the report will be a valuable contribution to the understanding of the events of that day. I am sure that the report will be a valuable contribution to the understanding of the events of that day. I am sure that the report will be a valuable contribution to the understanding of the events of that day. I am sure that the report will be a valuable contribution to the understanding of the events of that day.

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Office  
J. Edgar Hoover

June 15, 1972

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Mr. Bernard Orsi  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: May Civil Service Charge Applicants for  
Employment the State Fee for Processing  
Fingerprints?

Dear Mr. Orsi:

I have reviewed your letter of April 28, 1972, in  
which you pose the following questions:

1. May applicants for employment be required to pay a  
fee required by a State agency prior to being considered for  
employment?

2. May new employees at the time of certification be  
required to pay such a fee?

3. May applicants for positions for which State law  
requires disbarment for certain types of arrest record be  
required to pay such fees (school positions, law enforcement  
positions, etc.)?

Question #1:

Section 8.321 of the Charter does not disable the Civil  
Service Commission from requiring applicants for employment to  
pay a fee charged by the State for processing fingerprints.

This provision of the Charter merely states that competi-  
tive tests used to qualify applicants for positions in the  
Classified Civil Service "shall be without charge to the appli-  
cants." However, only qualified applicants may take the tests  
and the required fingerprinting relates to the qualifications

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Mr. Bernard Orsi

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June 15, 1972

of the applicants. There is no Charter provision which prohibits the City and County from requiring job applicants to pay for the expense of establishing their qualifications.

Question #2:

I refer you to the discussion above, which is premised on the theory that a fingerprinting investigation is required as a qualification for employment. Your staff has informed me that the fingerprinting and consequent reporting of the arrest record is required only when a prospective employee is about to be certified for appointment. You are advised that the charge for such report should only be imposed when the prospective employee is required to obtain the fingerprinting and this expense is actually incurred by the City.

Since the fee finds its genesis in State budgeting legislation requiring the State Bureau of Investigation to charge for the fingerprinting processing, the only remaining question is whether the City and County may pass this charge on to the applicant. It is my opinion that the state law does not disable the City and County of San Francisco from passing this fee on to its job applicants.

Question #3:

I find no basis for distinguishing applicants in the class enumerated in Question #3 from all others, and therefore advise you that the fee may be passed on to these individuals.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





June 9, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: United States Supreme Court Decision,  
Evansville-Vanderburgh Airport Authority  
District, et al. v. Delta Airlines, Inc.  
and Northeast Airlines v. New Hampshire  
Aeronautics Commission, April 19, 1972.  
Charge by State or Municipality of \$1 Per  
Commercial Airline Passenger to Help  
Defray Cost of Airport Construction and  
Maintenance Does Not Violate Federal  
Constitution

Dear Mr. Dolan:

This is in response to a request from Supervisor Dianne Feinstein for advice relative to the recent decision of the United States Supreme Court holding that a charge by a state or a municipality of \$1 per commercial airline passenger to help defray the cost of airport construction and maintenance does not violate the Federal Constitution. The advice requested consists of the following specific questions:

1. How does the decision affect the San Francisco International Airport?
2. Can there be a differential in charges levied on interstate passengers vis-a-vis intrastate passengers?
3. Can the funds so derived be deposited in the General Fund?
4. Can the funds so derived be specifically earmarked to offset the Municipal Railway deficit?



Mr. Robert J. Dolan

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June 9, 1972

## 1. Effect of Decision on San Francisco International Airport

Prior to the recent decision of the United States Supreme Court, the question was unsettled whether the imposition of a service charge for passengers emplaning commercial aircraft operated at an airport would be deemed unconstitutional as an unreasonable burden on interstate commerce. In the two cases of Evansville-Vanderburgh Airport Authority District, et al. v. Delta Airlines, Inc., et al. and Northeast Airlines, Inc., et al. v. New Hampshire Aeronautics Commission, et al., decided on April 19, 1972, the specific question posed was whether a charge by a state or municipality of \$1 per commercial airline passenger to help defray the cost of airport construction and maintenance violated the Federal Constitution. The United States Supreme Court held that, as imposed in the two cases, the charge did not violate the Federal Constitution, concluding that the provisions before it imposed valid charges on the use of airport facilities constructed and maintained with public funds.

Based on the aforesaid decision, it is my opinion that the Airports Commission, pursuant to the authority vested in it by Section 3.691 of the Charter, has the power to impose a service charge for each commercial airline passenger emplaning at San Francisco International Airport to help defray the cost of airport construction, maintenance and operation. The legal detail for such action by the Airports Commission does not appear material to the issues discussed herein, so will not be further touched upon. This office anticipates exploration of such detail with the Airports Commission.

## 2. Differential in Charge Between Interstate and Intrastate Passengers

A differential in charges levied on interstate passengers vis-a-vis intrastate passengers can be legally sustained only if there is a rational basis for distinguishing the two classes of passengers. In the two cases decided by the Supreme Court, it was pointed out that neither the fee imposed by the State of Indiana nor the State of New Hampshire discriminated against interstate commerce and travel, since both interstate and intrastate flights were subject to the same charges. Insofar as the charge is constitutionally sustainable on the premise that it constitutes a fair charge for the use of airport facilities, it seems to matter not whether the passenger is traveling intrastate

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Mr. Robert J. Dolan

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June 9, 1972

or interstate, since neither the distance traveled by, nor the destination of, the passenger materially affects the use of airport facilities provided to or required by the emplaning passengers. In the absence of the showing of an inherent difference between the two classes of flights, it would appear that the application of different fees would be unreasonably discriminatory, and hence invalid.

3. Deposit of Funds So Derived in the General Fund

All revenues received at San Francisco International Airport must be set aside and deposited in the "Airports Revenue Fund." (Charter §6.408(a).)

Section 6.408(b) of the Charter further provides:

"Moneys in the Airports Revenue Fund including earnings thereon shall be appropriated, transferred, expended or used for the following purposes pertaining to the financing, maintenance and operation of airports and related facilities owned, operated or controlled by the (Airports) commission and only in accordance with the following priority: (1) the payment of operation and maintenance expenses for such airports or related facilities; (2) the payment of pension charges and proportionate payments to such compensation and other insurance or outside reserve funds as the commission may establish or the board of supervisors may require with respect to employees of the commission; (3) the payment of principal, interest, reserve, sinking fund, and other mandatory funds created to secure revenue bonds hereafter issued by the commission for the acquisition, construction or extension of airports or related facilities owned, operated or controlled by the commission; (4) the payment of principal and interest on general obligation bonds heretofore or hereafter issued by the city and county for airport purposes; (5) reconstruction and replacement as determined by the commission or as required by any airport revenue bond ordinance duly adopted and approved; (6) the acquisition of land, real property or interest in real property for, and the acquisition, construction, enlargement and improvement of new and existing buildings, structures, facilities, utilities, equipment, appliances and other property





Mr. Robert J. Dolan

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June 9, 1972

necessary or convenient for the development or improvement of any airports and heliports owned, controlled or operated by the commission in the promotion and accommodation of air commerce or navigation and matters incidental thereto; (7) the return and repayment into the general fund of the city and county of any sums paid by the city and county from funds raised by taxation for the payment of interest on and principal of any general obligation bonds heretofore issued by the city and county for the acquisition, construction and improvement of the San Francisco International Airport; (8) for any other lawful purpose of the commission."

All charges levied by the Airports Commission on passengers emplaning at San Francisco International Airport must be deposited in the Airports Revenue Fund, and hence cannot be deposited in the General Fund. However, after the requirements of Items 1 through 6 are satisfied, any balance in the Airports Revenue Fund would be available for transfer to the General Fund to the extent that payments from funds raised by taxation have been made for interest and principal on general obligation bonds issued for the acquisition, construction and improvements at San Francisco International Airport. I have been advised by the Controller that the amounts thus paid from funds raised by taxation presently total approximately \$24,388,000.

4. Earmarking of Funds So Derived to  
Offset the Municipal Railway Deficit

For the reasons above stated, namely, the provisions of Section 6.408 of the Charter, funds derived from any levy of charges on passengers at San Francisco International Airport cannot be earmarked to offset the Municipal Railway deficit. All funds so derived must be deposited in the Airports Revenue Fund and appropriated, transferred, expended or used as specifically provided in Section 6.408(b).

A possible alternative method of imposing a charge on passengers emplaning from San Francisco International Airport would be the imposition of a local tax on the sale of airline tickets within the City and County of San Francisco.

The City and County of San Francisco has no extra-territorial power of taxation (South Pasadena v. Los Angeles Terminal





Mr. Robert J. Dolan

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June 9, 1972

Ry. Co., 109 Cal. 315, 321). Hence, the Board of Supervisors is without power to enact an ordinance imposing a tax on an event occurring at San Francisco International Airport situated wholly within the jurisdictional limits of another county, to wit: San Mateo County.

However, it would be within the power of the Board to impose a tax on a taxable local event such as the sale within San Francisco of airline tickets on planes departing from San Francisco International Airport, provided the measure of the tax is not discriminatory (City of Los Angeles v. Shell Oil Co., 4 C.3d 108, 122). Since the City and County of San Francisco, through its ownership and operation of San Francisco International Airport, provides facilities for the public use of airline passengers, such a tax under the Supreme Court decision would not violate the Federal Constitution. In this connection, the Court held that: "So long as the funds received by local authorities under the statute are not shown to exceed their airport costs, it is immaterial whether those funds are expressly earmarked for airport use." It would thus appear that any local tax so imposed would be constitutional so long as the funds derived therefrom did not exceed the airport costs.

However, it must be pointed out that such a tax could be easily avoided by a prospective airline passenger simply by purchasing the ticket elsewhere than within the jurisdictional limits of the City and County of San Francisco; as, for instance, at our airport. Hence, the revenue producing potential of such a local tax is highly questionable. Notwithstanding its apparent shortcoming, if imposition of such a local tax is nevertheless deemed desirable, upon request therefor I shall be pleased to prepare and submit the necessary legislation for introduction to the Board.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





June 19, 1972

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Mr. Bernard Orsi  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Bibliography of Material Used in  
Police Department Promotive Examinations  
Must Be Promulgated Not Less Than Six  
Months Prior to Examination

Dear Mr. Orsi:

This is in response to your recent letter in which you request an interpretation of the language of Charter Section 146 as amended in November 1971 concerning the bibliography to be promulgated for promotive examinations within the Police Department.

The specific language of the amendment is as follows:

"The civil service commission shall provide for promotion in the police department on the basis of examinations and tests as hereinabove set forth at least once every four years for each promotive position or rank in the police department and questions asked or problems given in said examination shall be related to material taken from a bibliography promulgated within the police department from time to time by the police commission which will be prepared in consultation with the civil service commission; provided, however, that any such bibliography shall be promulgated within the police department not less than six months prior to the date of any promotive examination within the police department."

Your specific question is whether or not an examination may be held prior to six months from the availability of items on the scope.

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Mr. Bernard Orsi

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June 19, 1972

This paragraph was placed in the Charter in the November election of 1971 and has not yet been interpreted. It is clear, however, that the bibliography must be promulgated not less than six months prior to the date of the promotive examination. (Emphasis added.) The questions asked or problems given in the examination must be related to material taken from this bibliography. The obvious purpose of this language is to allow the applicants for the examination a six month period to study the sources of the material from which the examination is to be given.

In view of the language and the obvious purpose of the language, the source of the examination contained in the bibliography must be equally available to all those taking the examination for a period of not less than six months prior to the date of the examination. The bibliography must be promulgated at least six months before the date of the examination.

Very truly yours

THOMAS M. O'CONNOR  
City Attorney

TO: DIRECTOR, FBI  
FROM: SAC, NEW YORK  
SUBJECT: [Illegible]  
[Several paragraphs of illegible text follow, appearing to be a memorandum or report.]

[Illegible signature and stamp area]



June 19, 1972

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Mr. Philip P. Engler  
Acting Clerk, Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Collective Bargaining With Municipal  
Railway Platform Employees

Dear Mr. Engler:

By letter of May 31, sent at the direction of Supervisor von Beroldingen, advice is sought upon the question of whether "there is any statutory prohibition against a collective bargaining agreement between the City and County of San Francisco and the transport workers." The latter reference is, of course, to Local 250A of the Transport Workers Union of America.

We are impelled to advise Supervisor von Beroldingen that there is both statutory and case law constituting prohibition against a collective bargaining agreement between the City and County of San Francisco and the Transport Workers Union.

Charter Section 8.404 (formerly §151.3.1--sometimes popularly designated as Proposition "G" by virtue of ballot placement in the November 7, 1967, election) provides a full and exclusive method for determining and fixing the "wages, conditions and benefits of employment" allowable to platform employees of the Municipal Railway. In addition, and subject to certain conditional factors not germane to our instant considerations, that same section (8.404) makes it clear that the health insurance, retirement and vacation benefits provided for in other sections of the Charter to City's employees in general shall also apply to City's platform employees.

In short, our local Charter embraces a complete scheme for providing to platform employees all of the "wages and conditions" elements customarily found in a collective bargaining agreement in the private employment sector. Any process of collective bargaining between City and its platform employees would



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Mr. Philip P. Engler

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June 19, 1972

first require Charter amendments to eliminate the presently controlling Charter processes noted above.

The foregoing analysis of the effect of our Charter as prohibitive of collective bargaining with platform employees is fully supported by case law. On a number of occasions, it has been judicially asserted that the terms and conditions of public employment are set by legislation, and not by contract. (Nutter v. Santa Monica, 74 Cal.App.2d 292; City of Los Angeles v. Los Angeles etc. Council, 94 Cal.App.2d 36; Newmarker v. Regents of the University of Cal., 160 Cal.App.2d 640.)

While it is true that in limited instances explicit statutory authority has permitted collective bargaining between certain public entities and their employees (see Los Angeles MTA v. Brotherhood of Railway Trainmen, 54 Cal.2d 684 and State of California v. Taylor, 353 U.S. 553, 1 L.Ed.2d 1034), such is obviously not the case herein because of the above noted application of Charter Section 8.404 to platform employees.

Note should also be taken of the fact that even under the terms of the Meyers-Millias-Brown Act (Gov. Code §§3500 et seq.), no such process as "collective bargaining" is authorized. To the contrary, Section 3509 thereof states that:

"The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees." (Emphasis added.)

Labor Code Section 923 states it to be the "public policy" of California that "Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees." Also, that section speaks of the employees' privilege for "collective bargaining or other mutual aid or protection."

However, the negative declaration contained in Government Code Section 3509, as quoted above, makes it evident that it is not currently the "public policy" in California that there shall be collective bargaining between public entities and their employees. It appears true that shifting philosophies may soon bring collective bargaining into public employment in California; but upon the existing state of controlling law, we must hold that such practice is not presently a legal vehicle for the resolution of local personnel issues.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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June 21, 1972

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Mr. James F. Wurm  
Assistant General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Street Cleaner Rate of Pay Established  
by Collective Bargaining Agreement as  
Applicable to Street Cleaners in City  
Service

Dear Mr. Wurm:

This is in reply to your request for opinion whether the Civil Service Commission must certify the rate of pay established for street cleaners in private industry under collective bargaining agreement as the rate of pay for street cleaners in the City and County service.

In 1966 the Superior Court in the case of Freed v. City and County of San Francisco, No. 531299, ordered that the City set the salary for street cleaners in accordance with Section 151 of the Charter so that such rate bears a realistic relationship to the rate of pay being paid to laborers performing street work in private employment. At that time there was no collective bargaining agreement setting the rate of pay for street cleaners in private industry. Subsequent to the Freed judgment and in accordance therewith, a memorandum of agreement was entered into between plaintiffs and the Civil Service Commission setting the rate of pay for street cleaners at 90 per cent of the rate of pay being paid to laborers in private industry as established by collective bargaining agreement.

In your letter you advise that The Associated General Contractors of California, Inc. and the Northern California District Council of Hod Carriers, Building and Construction Laborers have established a rate of pay by collective bargaining agreement for street cleaners in private industry and have included that rate in the Laborers' Master Agreement at page 57, a copy of which is attached to your request.



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Mr. James F. Wurm

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Section 8.403 of the Charter (formerly §151.3) provides in part:

"Whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and establishments employing such groups or crafts in San Francisco and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as the compensations for such groups and crafts engaged in the city and county service."

Section 8.403 requires the Civil Service Commission to certify a collective bargaining rate when such rate is recognized and paid by private industry in San Francisco, and the Board of Supervisors shall fix such rate of pay as compensation for similar groups or crafts in the City and County service. Therefore, if the Civil Service Commission finds that the street cleaner rate included in the Laborers' Master Agreement is recognized and paid throughout private industry in San Francisco, then the Commission must certify that rate to the Board of Supervisors as the generally prevailing rate of pay for street cleaners. Thereafter, the Board must fix that rate as compensation for street cleaners in the City and County service.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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June 26, 1972

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Mr. Arthur S. Becker, Director  
Parking Authority of the City and  
County of San Francisco  
450 McAllister Street  
San Francisco, California 94102

Subject: Workmen's Compensation Coverage  
for Officers and Employees of  
the Parking Authority

Dear Mr. Becker:

This is in response to your letter requesting my advice with respect to workmen's compensation coverage for officers and employees of the Parking Authority.

The Parking Authority of the City and County of San Francisco was activated pursuant to the provisions of the Parking Law of 1949. (Sts. & Hy. Code, §§32500 et seq.) The Parking Authority is "a public body corporate and politic." (Sts. & Hy. Code, §32650.) Consequently, the Parking Authority is an entity separate and distinct from the City and County of San Francisco.

The statutory provisions governing workmen's compensation coverage and benefits in the State of California are set forth in the Labor Code. Section 3600 of the Labor Code provides:

"Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in Section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

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Mr. Arthur S. Becker

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June 26, 1972

"(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

"(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

"(c) Where the injury is proximately caused by the employment, either with or without negligence.

"(d) Where the injury is not caused by the intoxication of the injured employee.

"(e) Where the injury is not intentionally self-inflicted.

"(f) Where the employee has not willfully and deliberately caused his own death.

"(g) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor."

In accordance with Section 3600, whenever an "employee" sustains injury or is killed under circumstances contemplated by the provisions of Section 3600, his "employer" becomes liable for the benefits provided under the workmen's compensation program set forth in the Labor Code.

Section 3300 of the Labor Code, insofar as pertinent herein, defines "employer" to mean:

"(a) The State and every State agency.

"(b) Each county, city, district, and all public and quasi public corporations and public agencies therein. (Emphasis added.)

" . . ."

The Parking Authority is clearly an "employer" within the meaning of the Labor Code.



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(2) The second part is devoted to a discussion of the experimental results obtained in the study of the structure of the atom.

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Mr. Arthur S. Becker

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June 26, 1972

Section 3351 of the Labor Code defines "employee" to mean:

" . . . every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes:

"(a) Aliens and minors.

"(b) All elected and appointed paid public officers.

"(c) All officers and members of boards of directors of quasi-public or private corporations while rendering actual service for such corporations for pay; provided that, where the officers and directors of any such private corporation are the sole shareholders thereof, the corporation and such officers and directors shall come under the compensation provisions of this division only by election as provided in Section 4151(a)."

The officers and employees of the Parking Authority are clearly "employees" within the meaning of the Labor Code. This office has previously advised you that members of the Parking Authority are also "employees" of the Parking Authority while rendering actual service to the Parking Authority. (See City Attorney's Opinion No. 395, dated June 11, 1951.)

From the foregoing, it can be seen that whenever an "employee" of the Parking Authority is injured or killed under circumstances entitling such "employee" or his dependents to workmen's compensation benefits, the Parking Authority, as the "employer," is liable for such benefits and must provide them.

An "employer" other than the State of California and its political subdivisions is required to secure the payment of workmen's compensation benefits either by being insured against liability for such benefits or by qualifying to be "self-insured." (Lab. Code, §3700.) The State of California and its political subdivisions may be "permissibly uninsured" for their workmen's compensation liability without satisfying the requirements imposed upon private employers who desire to be "self-insured." (Lab. Code, §3700.) The City and County of San Francisco is,

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except for certain special categories of employees, "permissibly uninsured" with respect to its liability for workmen's compensation benefits.

If the State of California, its political subdivisions or other public agencies desire to insure against their liability for workmen's compensation benefits, such insurance must be obtained through the State Compensation Insurance Fund. (Ins. Code, §11870.) From the statements in your letter, it appears that the Parking Authority has heretofore determined to insure against its workmen's compensation liability and is currently insured through the State Compensation Insurance Fund.

In your letter, you allude to the fact that, pursuant to a Charter amendment effective in 1963, officers and employees (but not members) of the Parking Authority are eligible for membership in the San Francisco City and County Employees' Retirement System. (Charter, §8.504, formerly §158.4 of the Charter of 1932.) Membership in the Retirement System has nothing to do with the entitlement of a Parking Authority member, officer or employee to workmen's compensation benefits. If such member, officer or employee sustains an industrial injury, the Parking Authority will be liable to provide him with workmen's compensation benefits, even though he is not a member of the Retirement System.

It is true that the Retirement Board of the San Francisco City and County Employees' Retirement System has been designated as the body within the City and County government to administer the benefit provisions of the California workmen's compensation laws. (Charter, §8.515, formerly §172 of the Charter of 1932.) However, the Retirement Board is authorized to administer such benefits only with respect to officers and employees of the City and County, the San Francisco Unified School District and the San Francisco Community College District. (Charter, §8.515.) Since the Parking Authority is a legal entity separate and distinct from the City and County of San Francisco, the Retirement Board is not authorized to administer the workmen's compensation benefits for the members, officers or employees of the Parking Authority.

In specific response to your request for advice, please be advised that the Parking Authority should continue to provide workmen's compensation coverage for its members, officers and employees by insuring through the State Compensation Insurance Fund.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION  
PUBLISHED WEEKLY  
CHICAGO, ILL., U.S.A.

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June 29, 1972

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Donald M. Scott, Chief  
San Francisco Police Department  
850 Bryant Street  
San Francisco, California 94103

Subject: Retirement Rights of Director  
of Traffic

Dear Chief Scott:

This is in response to your request for my opinion with respect to the effect, if any, of the passage of Proposition E (November 2, 1971 election) upon the rights of the Director of Traffic under the San Francisco City and County Employees' Retirement System. Your specific concern is the effect, if any, which Proposition E would have with respect to the determination of the salary upon which the amount of the Director of Traffic service retirement allowance will be based.

The Director of Traffic is a member of the Retirement System pursuant to the provisions of Section 8.544 of the Charter and, therefore, he is subject to mandatory retirement on the first day of the month next following his attainment of the age of sixty-five years. (Charter, §8.546.) I understand that the Director of Traffic will attain the age of sixty-five years in the month of July 1973, and, consequently, he will be compulsorily retired effective August 1, 1973, unless he should voluntarily retire prior to that date.

Members of the Police Department are qualified for service retirement upon the completion of twenty-five years of credited service and attainment of the age of fifty years. (Charter, §§8.546 and 8.549.) Upon retirement for service, a member of the Police Department is entitled to a retirement allowance equal to 55 per cent of his "final compensation," plus an allowance at the rate of 3 per cent of said "final compensation" for each year of service rendered after qualifying for retirement as to age and service. (Charter, §8.546.)

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The allowance, however, may not exceed 70 per cent of the member's "final compensation."

The term "final compensation," insofar as pertinent to your inquiry, means:

" . . . the monthly compensation earnable by a member at the time of his retirement . . . at the rate of remuneration attached at that time to the rank or position which said member held, provided that said member has held said rank or position for at least one year immediately prior to said retirement . . .; and provided, further, that if said member has not held said rank or position for at least one year immediately prior to said retirement . . ., 'final compensation,' as to such member, shall mean the monthly compensation earnable by such member in the rank or position next lower to the rank or position which he held at the time of retirement . . . at the rate of remuneration attached at the time of said retirement . . . to said next lower rank or position." (Charter, §8.545.)

As can be seen from the foregoing definition of "final compensation," in order for the Director of Traffic to receive a retirement allowance based upon the salary of the rank of Director of Traffic, he must have held that rank for at least the one year immediately prior to his retirement.

Proposition E (November 2, 1971, election) amended, inter alia, Sections 3.530 and 3.531 of the Charter so as to abolish certain ranks in the Police Department, including that of Director of Traffic and so as to authorize the Police Commission to create new or additional ranks or positions in the department. I understand that on April 12, 1972, the Police Commission, pursuant to the authority granted it under Section 3.530, as amended, adopted Resolution 167-72, whereby it created, effective July 1, 1972, each of the positions, including that of Director of Traffic, which would be abolished at the close of June 30, 1972, in accordance with the amendments effected by Proposition E. Resolution 167-72 recites that:

" . . . it is the intent of the Police Commission that the above stated newly created positions having the same title as such positions that existed in the Police Department prior to

The University of Chicago, Chicago, Ill., June 1, 1911.

Dear Sirs:

I have the honor to acknowledge the receipt of your letter of the 28th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. I am, however, unable to say whether or not the same will be granted, as this is a matter which is entirely in their hands. I am, however, sure that they will give it the most careful consideration. I am, Sir, very respectfully,  
Yours truly,  
The University of Chicago

I am, Sir, very respectfully,  
Yours truly,  
The University of Chicago

I am, Sir, very respectfully,  
Yours truly,  
The University of Chicago

I am, Sir, very respectfully,  
Yours truly,  
The University of Chicago



Donald M. Scott

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June 29, 1972

July 1, 1972, are the same positions, and are not to be considered for purposes of retirement, salary rights or salary increments as new positions."

It is clear, therefore, that the intent and effect of this resolution was to continue in existence without change the ranks and positions which would otherwise be abolished at the close of June 30, 1972, by the operation of the amendments effected by Proposition E.

With specific reference to the rank of Director of Traffic, Resolution 167-72 has the effect of continuing that rank without any break in its existence. Consequently, the passage of Proposition E will not have any effect upon the determination of the amount of the service retirement allowance of the Director of Traffic.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



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Document Number 100-100000

1. The first part of the document is a list of the names of the persons who were present at the meeting on the 10th of the month of the year 1972.

2. The second part of the document is a list of the names of the persons who were present at the meeting on the 11th of the month of the year 1972.

3. The third part of the document is a list of the names of the persons who were present at the meeting on the 12th of the month of the year 1972.

4. The fourth part of the document is a list of the names of the persons who were present at the meeting on the 13th of the month of the year 1972.

5. The fifth part of the document is a list of the names of the persons who were present at the meeting on the 14th of the month of the year 1972.

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July 3, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Applicability of Brown Act to Action  
Taken by Committees of Board of  
Supervisors

Dear Mr. Dolan:

I have your letter dated June 27, 1972, requesting my opinion as to the legality of the practice of committees of the Board of Supervisors taking a proposed measure under submission and subsequently making in a nonpublic session a decision concerning recommendation or other disposition of the measure.

Initially, your request requires a consideration of the applicability of the Ralph M. Brown Act (Gov. Code § 54950 et seq.) to committees of the Board of Supervisors.

Under Government Code Section 54953 all meetings of the legislative body of a local agency are required to be open and public. "Legislative body" is defined in Government Code Section 54952 as follows:

"As used in this chapter, 'legislative body' means the governing board, commission, director or body of a local agency, or any board or commission thereof, and shall include any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation." (Underlining added.)

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Mr. Robert J. Dolan

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The underlined portion of Section 54952 above is the wording as originally enacted. It was construed by the Attorney General in 1958 as not including committees of legislative bodies where such committees consist of less than a quorum of the members of the legislative body that created them.

"The attorney general ruled in 32 Ops. Cal. Atty. Gen. 240, 242, that under section 54953 'only meetings of the legislative body of a local agency are required to be open and public.' He further held that the law 'does not apply to special committees or subcommittees of local agencies where such committees consist of less than a quorum of the members of the legislative body that have created them.' (P. 240.) At page 241 it is said: 'Local agencies may and do perform much of their work through committees. Public agencies usually have a number of standing committees and frequently appoint special committees to investigate and report concerning specific matters. Such committees are mere instrumentalities of the governing agency and their determinations are not the determinations of the agency. The agency may not delegate its powers to a committee. Only when and if the agency ratifies and approves the act of one of its committees does it become the act of the agency.' At 242: 'Ordinarily, a committee is composed of less than a quorum of the legislative body that has created it. In those cases the findings of such a committee have not been deliberated upon by a quorum of the legislative body and the necessity, as well as opportunity, for full public deliberation by the legislative body still remains. Thus the public's rights under the secret meeting law are protected. Therefore, meetings of committees of local agencies where such committees consist of less than a quorum of the members of the legislative body are not covered by the act.'" Adler v. City Council (1960) 184 Cal.App.2d 763, 771.

At the 1959 session of the Legislature a bill which was introduced to extend Section 54952 to "any committee or advisory committee" of any board or commission failed to pass. (See Adler v. City Council, supra, at page 772.) Thus, if the



The following is a list of the names of the members of the American Medical Association who have been elected to the office of President for the year 1912. The names are listed in alphabetical order of their last names.

THE AMERICAN MEDICAL ASSOCIATION

President: Dr. J. C. Brainerd, Chicago, Ill.

Vice-President: Dr. W. H. Wood, New York, N. Y.

Secretary: Dr. J. H. Hays, St. Louis, Mo.

Treasurer: Dr. J. H. Hays, St. Louis, Mo.

Editor: Dr. J. H. Hays, St. Louis, Mo.

Editorial Board: Dr. J. H. Hays, St. Louis, Mo.

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Mr. Robert J. Dolan

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July 3, 1972

Legislature had intended to extend the Brown Act to committees of less than a quorum of the legislative body, the plain, simple and direct language of the bill would have been sufficient.

In the 1961 session of the Legislature A.B. 363 was introduced to extend the Brown Act to private agencies by including them in Section 54952 if the membership was composed in part of public officers and the activities of the agencies were supported in whole or in part by public funds. Private agencies objected and A.B. 363 was amended so as to add to Section 54952 the non-underlined portion set forth above (Vol. 1, Journal of the California Assembly, 1961, p. 983) to apply only to those publicly supported boards, commissions or committees of private or public agencies on which public officials served in their official capacity. Therefore, the added language refers to boards, commissions or committees of something other than those of the legislative body.

It should also be noted that the trial court in Sacramento Newspaper Guild v. Sacramento County Board of Supervisors (1968) 263 Cal.App.2d 41, 48, while enjoining informal meetings of the county board of supervisors limited the injunction to board and committee meetings of a quorum or more. In this connection the Attorney General has recently stated:

"Permeating the whole coverage or applicability of the Act is what may be termed 'the less than a quorum exception' to the Act. As noted above on the general applicability of the Act, section 54952.3, relating to advisory bodies of the local agency, now expressly codifies this exception as it relates to such advisory bodies. Section 45952.3 was added to the Act in 1968. However, since the opinion of this office rendered in 1958 in 32 Ops.Cal.Atty.Gen. 240 (1958), such an exception has been recognized in varying circumstances. In general terms, the concept is that the Act does not apply to meetings of committees of less than a quorum of the legislative body of the local agency. This is because the findings of such a committee have not been deliberated upon by a quorum of the legislative body, and consequently the opportunity for a full public hearing and consideration of the committees' findings and recommendations by a quorum still remains. Hence the public's rights under the Act are still protected." (Office of the Attorney General, Secret



Mr. Robert J. Dolan

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Meeting Laws Applicable to Public Agencies, January 1972, page 6.)

Additionally, there has been introduced in the 1972 session of the Legislature a bill (A.B. 2225) to include committee or subcommittee of a legislative body in the term "legislative body" as used in Section 54952. The bill is as follows:

"As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency, or any board, commission, committee or subcommittee thereof, whether composed of more than, or less than, a quorum and shall include any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation." (Underlined portion represents the proposed amendment.)

Thus, it would be reasonable to assume that Section 45952 does not include subcommittees or committees of less than a quorum of a legislative body. Otherwise, there would be no need for proposed amendment set forth above.

Therefore, it is my opinion that the Ralph M. Brown Act does not apply to committees of the Board of Supervisors which are less than a quorum thereof.

Moreover, it would appear that the practice of committees of the Board to take a proposed measure under submission, after discussion and deliberation at a public meeting, for decision in a nonpublic session would not be subject to the Brown Act. Section 54952.6 defines "action taken" to which the Act applies as follows:

"As used in this chapter, 'action taken' means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting



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Mr. Robert J. Dolan

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July 3, 1972

as a body or entity, upon a motion, proposal, resolution, order or ordinance." (Emphasis added.)

Most recently in Treskunoff v. Human Rights Commission, et al., Superior Court No. 624-642, the trial court came to the opposite opinion in that the court concluded regular, standing committees of the Human Rights Commission were within the terms of Section 54952 and were subject to the Brown Act. I consider the court's decision erroneous and Notice of Appeal has been filed. Consequently, the trial court decision cannot be considered final and determinative of the question.

Additionally, the defendants in that action were the Human Rights Commission and its members only and the decision even if final, would only be enforceable as to that body. A judicial decision is not law except as to the case in which it is made (12 Cal.Jur.2d 643) and a decision of a trial court is not a binding precedent. (See King v. United Commercial Traveler, 92 L.Ed. 608, 611.)

You are so advised.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



THE JOURNAL OF THE  
ROYAL SOCIETY OF MEDICINE  
(LONDON)

THE JOURNAL OF THE  
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THE JOURNAL OF THE

ROYAL SOCIETY OF MEDICINE

July 3, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Conflict of Interest Where State Law  
Requires Membership of Supervisors  
on Multi-County Agency Board; Duty  
of Supervisor to Follow Official City  
and County Policy in Latter Capacity

Dear Mr. Dolan:

This is in response to your inquiry as to whether membership by a City and County Supervisor on the governing board of a multi-county agency such as the Bay Area Air Pollution Control District or the Golden Gate Bridge, Highway and Transportation District, even though required by State statute, constitutes a conflict of interest. You further inquire as to whether a member of the Board of Supervisors holding such dual membership is required as a matter of law to vote in such multi-county capacity in accordance with San Francisco's officially established policy.

In Letter Opinion No. 69-8, dated January 28, 1969, I advised that the appointment of members of your Board and the Board of Directors of the then Golden Gate Bridge and Highway District as required by State statute (Sts. & Hy. Code, §27122) did not constitute a conflict of interest, pointing out as follows:

"Prior to the action of the State Legislature in 1968 it had been judicially established that the duties of the office of director of a bridge and highway district and that of county supervisor of a county comprising the district are incompatible and that entrance by one holding either office upon the duties of the second office terminated the first office as effectively as a resignation. (People ex rel. Bagshaw v. Thompson, 55 Cal.App.2d 147.)



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"The Bagshaw decision was based upon the common law rule which, by statute, is the rule of decision in all the courts of the State of California insofar as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State of California. (Civil Code, Sec. 22.2).

"The mandate contained in Section 27122 of the Streets and Highways Code as added by the Legislature in 1968, that four of the directors of the Golden Gate Bridge and Highway District be elected members of the Board of Supervisors of the City and County of San Francisco is inconsistent with the common law rule holding of the court in the Bagshaw case that these two offices are incompatible and, to that extent, the common law has been superseded by statute. (Civil Code, Sec. 22.2; Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56; Ex parte Bagwell, 26 Cal.App.2d 418.)"

In my opinion, the conclusion reached in Letter Opinion No. 69-8 would be applicable to any situation where a State statute requires that a member or members of your Board of Supervisors be elected or appointed to the governing body of a multi-county agency, and accordingly, such dual membership would not constitute a conflict of interest.

An answer to your second item of inquiry calls for an analysis of the legislation creating, or authorizing the creation of, each such multi-county agency. With respect to the two specific multi-counties agencies mentioned in your letter, namely, the Golden Gate Bridge, Highway and Transportation District and the Bay Area Air Pollution Control District, such analysis reveals the following pertinent information:

The Golden Gate Bridge, Highway and Transportation District was created pursuant to the provisions of the Bridge and Highway District Act. (Sts. & Hy. Code, §§27000 et seq.) Section 27122 of the Streets and Highways Code, relating to the composition of the Board of Directors of said District, provides as follows:

"The composition of the board of directors of the district shall be as follows:







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"(a) One director, representing Del Norte County, one director, representing Mendocino County, and one director, representing Napa County, appointed by the board of supervisors of the respective represented county.

"(b) Three directors, representing Marin County, appointed by the board of supervisors thereof. One of such directors shall be an elected member of said board of supervisors, and another of such directors shall be an elected member of a city council of a city within Marin County, and shall be designated by the Marin Council of Mayors and Councilmen.

"(c) Three directors, representing Sonoma County, appointed by the board of supervisors thereof. One of such directors may be an elected member of said board of supervisors, and another of such directors shall be an elected member of a city council of a city within Sonoma County, and shall be designated by the Mayors' and Councilmen's Association of Sonoma County.

"(d) Nine directors, representing the City and County of San Francisco, eight of which shall be appointed by the board of supervisors thereof, and one of which shall be appointed by the mayor thereof, by an order of appointment, a certified copy of which shall be immediately forwarded to the Secretary of State. Four of such directors shall be elected members of said board of supervisors."

As you will note, Section 27122 specifically provides that the directors appointed from each of the respective counties comprising the District "represent" their respective counties. To "represent" a person has been defined as: "to stand in his place; to supply his place; to act as his substitute." (Plummer v. Brown, 64 Cal. 429; Black's Law Dictionary, 4th Ed.) Hence, any member of the District "representing" the City and County of San Francisco on said District stands in the place of said City and County and acts as the substitute thereof. Accordingly, in my opinion, each such director has a duty, as a matter of law, to vote in such multi-county capacity in accordance with San Francisco's officially established policy.



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The Bay Area Pollution District was created directly by the State Legislature. (Stats. 1955, ch. 1797; Health & Saf. Code, §§24345 et seq.) The District is a public agency of the State (Health & Saf. Code, §24350.1), established for the purpose of providing a special district to control and suppress air pollution in the Bay Area (Health & Saf. Code, §24346.2) which the Legislature found to be detrimental to the public peace, health, safety and welfare of the people of the State. (Health & Saf. Code, §24346.) The governing body of the District is a Board of Directors, composed of members of the boards of supervisors of the counties, and mayors and city councilmen of the cities, comprising the District. (Health & Saf. Code, §24352.) The District is charged with the duty of establishing and executing an effective program for the reduction of air contaminants within the District (Health & Saf. Code, §24354.1) and is empowered to do such acts as may be necessary to carry out the provisions of the law creating the District. (Health & Saf. Code, §24354.2.) In carrying out the powers and duties of the District, the members of its Board of Directors are serving a statewide interest and owe their undivided allegiance to the people of the entire state. Accordingly, in my opinion, each such director has a duty, as a matter of law, to vote in such multi-county capacity in accordance with his best judgment as to what would best serve the interest of the people of the entire state, even though such vote may not at all times be in accordance with San Francisco's officially established policy.

The conclusions reached herein relate only to the two specific multi-county agencies cited as examples in your inquiry. As pointed out hereinabove, a question relating to any other multi-county agency would require an analysis of the legislation creating, or authorizing the creation of, such multi-county agency.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

The first of the papers read at the meeting was by Mr. H. H. S. ...  
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The third paper was by Mr. ...  
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THE JOURNAL OF THE  
ROYAL ANTHROPOLOGICAL INSTITUTE  
Vol. 1, No. 1, 1901



July 3, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Draft of Amendment to  
Charter Section 3.500

Dear Mr. Dolan:

You have requested that this office prepare an amendment to Charter Section 3.500 which incorporates (1) a means of enforcement for requirement that meetings of boards and commissions be open and public, and (2) a provision that any action taken at a meeting held in violation be deemed null and void.

A draft of a proposed amendment is enclosed herewith.

The matter of open public meetings is a matter of statewide concern and the Brown Act (Gov. Code §§54950 et seq.) applies to charter cities. Government Code Section 54959, declaring that attendance by a member of a legislative body at a meeting thereof where action is taken in violation of the Brown Act or its amendments is a misdemeanor, and Section 54960, providing for mandamus and injunction to stay or prevent violations or threatened violations which were added by the Legislature in 1961, explicitly provide means of enforcement of the open meeting law. The provisions in the draft of the charter amendment which provide that meetings shall be "open and public in accordance with the requirements of the statutes of California applicable thereto" can be regarded as confirmatory of existing law and as serving to remove any ground of legal challenge with respect to a means of enforcement. The penalties cannot be different from those provided under State law.

Your second request that a provision be drafted to make actions taken at a meeting held contrary to the provisions of the Brown Act has been included in the amendment. Where a matter is of statewide concern, a local entity cannot legislate





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unless it can be determined that the State law has not occupied the field of legislation. The members of the Board of Supervisors will recall the litigation with respect to the San Francisco gun registration ordinance wherein the California Supreme Court held that the State laws respecting gun control did not indicate an intent to occupy the field and it was held that the San Francisco ordinance regulated in an area where the State law was not only silent on the subject, but that there was no intent to legislate or not to legislate in the field of gun registration. (Galvin v. Superior Court of the City and County of San Francisco, 70 C.2d 851.)

It is my opinion that the same legal principles are involved here. The State legislation proposed in 1961 (Assembly Bill No. 127) included a provision that made void the actions taken at an illegal meeting. Governor Edmund G. Brown vetoed the bill and in so doing sent the following message to the Assembly on March 8, 1961:

"I believe that this bill would seriously imperil the finality of all local legislative decisions. The Bill provides that any action taken at a non-public meeting, defined in the Bill as any 'collective decision . . . or collective commitment or promise . . .', is void. Presumably this would also mean that any such decision merely ratified at a public meeting would also be void. As a result disgruntled persons, unhappy with a decision of a local legislative body could attack it, whether with merit or not, in Court, thereby delaying and obstructing all action. The consequences for bond resolutions, for example, could be paralyzing.

"I do not believe there is a need for such a drastic remedy. I refuse to believe that there is any widespread violation of the present law requiring public meetings by municipal and local officials of this State. In my judgment this Bill would effectively obstruct progressive local legislation without any corresponding benefit.

"Accordingly, I am returning the Bill without my signature."

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Mr. Robert J. Dolan

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Thereafter, on May 9, 1961, Assembly Bill No. 363 was amended to include those provisions of Assembly Bill No. 127 to which the Governor had not expressed any objection. The bill was adopted by the Legislature and signed into law by the Governor and is incorporated in the Government Code as an amendment to the Brown Act. The veto and subsequent legislation illustrate that the Legislature has left untouched an area which can be considered as outside of the field of state preemption and as a legal matter can be made the subject of local law.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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July 3, 1972

Mr. Elmo E. Ferrari, President  
The Police Commission  
850 Bryant Street  
San Francisco, California 94103

Subject: Police Commission Disciplinary Proceedings  
--Necessity for Public Hearing  
(Charter §8.343)

Dear Mr. Ferrari:

This refers to your request for an opinion relating to disciplinary procedures. You submitted two questions for my review:

1. Does a member of the Police Department appearing before the Police Commission on a disciplinary proceeding have the right to request a private hearing?
2. If answer to No. 1 above is in the affirmative, is the Police Commission obligated to hold a private disciplinary hearing if requested by the accused, or may it deny such a request?

Section 8.343 of the Charter of the City and County of San Francisco reads in part as follows:

" . . . The accused shall be entitled, upon hearing, to appear personally and by counsel; to have a public trial; and to secure and enforce, free of expense, the attendance of all witnesses necessary for his defense."

The Brown Act (Gov. Code §§54900 et seq.) is of state-wide application and governs local entities, including the City and County of San Francisco, a charter city (Gov. Code §54953).

The Brown Act generally requires that all deliberations of public bodies, such as the Police Commission of the City and

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Mr. Elmo E. Ferrari

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July 3, 1972

County of San Francisco, be held in public. Section 54957 sets forth an exception to this general rule. That section provides in part:

"Nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding executive sessions during a regular or special meeting to consider the appointment, employment or dismissal of a public officer or employee or to hear complaints or charges brought against such officer or employee by another public officer, person or employee unless such officer or employee requests a public hearing. . . ."

Thus, the state law specifically empowers the legislative body of local agencies to hold a closed hearing when conducting a disciplinary hearing on a charge lodged against one of its officers. The state law heretofore mentioned provides that the employee may request a public hearing and if he does so request it must be given to him. In the absence of a request for a public hearing by the employee, the state law grants to the commission the discretion as to whether it wishes to hold the hearing in public or in private.

In response to your first question you are advised that an officer may request that a disciplinary proceeding be heard in private.

In answer to your second question you are advised that you are not obligated to accord a nonpublic hearing to the employee as requested. The determination of whether to hold a public or nonpublic proceeding rests solely with the Police Commission as a matter of law.

The power of the commission to conduct a nonpublic disciplinary proceeding arises from a specific exception to the general requirements of the Brown Act that all deliberations of public bodies be held in public.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

THE UNIVERSITY OF CHICAGO  
CHICAGO, ILLINOIS 60637

TO THE PRESIDENT OF THE UNIVERSITY OF CHICAGO  
FROM THE DEAN OF THE FACULTY  
SUBJECT: [illegible]

[illegible text]

[illegible text]

[illegible text]

[illegible text]

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[illegible text]



July 5, 1972

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Mr. Robert J. Dolan, Clerk  
Board of Supervisors  
235 City Hall  
San Francisco, California 94102

Subject: Declaration of Policy; Legal  
Effect of Vote Opposing Police  
Commission Action of Closing  
District Stations

Dear Mr. Dolan:

This is in response to your recent inquiry requesting my advice as to the legal effect of the rejection by the voters of the action of the Police Commission in closing two district police stations and whether there is any possibility of transmuting the action of the voters into a request or demand that the Police Commission reconsider its decision to close the stations.

The declaration of policy with respect to the closing of the stations appeared on the ballot of the direct primary election held on June 6, 1972, as Proposition "O" reading as follows: "Should Park and Potrero Police Stations be closed at this time?" The vote thereon was as follows: "Yes" 62,756, "No" 115,106.

The submission of a declaration of policy to the voters and the legal effect thereof is covered by the provisions of Section 9.108 of the Charter which reads in part as follows:

" . . . Any declaration of policy may be submitted to the electors in the manner provided for the submission of ordinances; and when approved by a majority of the qualified electors voting on said declaration, it shall thereupon be the duty of the board of supervisors to enact an ordinance or ordinances to carry such policies or principles into effect, subject to the referendum provisions of the charter. . . ."





Mr. Robert J. Dolan

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July 5, 1972

A strict interpretation of the provisions of Section 9.108 of the Charter would lead to the conclusion that the Board of Supervisors is the only body required to act thereunder and that the duty of the Board of Supervisors to take appropriate action to carry the policies or principles of a declaration of policy into effect arises only upon the "approval" by a majority of the qualified electors voting upon such declaration of policy, and that since, in the instant case, the declaration of policy was not so approved, neither the Board nor any other officer, board or commission has a duty to take action thereon.

However, the provisions of Section 9.108 of the Charter do not preclude Board action where, as here, the declaration of policy is rejected by the voters but such rejection is tantamount to a declaration of policy that the district stations remain open.

In Farley v. Healey, 67 Cal.2d 325, the California Supreme Court, in rejecting a contention that the provisions of Section 179 of the Charter (now §9.108, supra) precluded submission of an initiative declaration of policy relating to the Vietnam war unless it could be put into effect by ordinance, stated in part as follows:

" . . . the board of supervisors can enact ordinances carrying out the policy of the declaration to express the popular will. The board by ordinance can use the avenues of advocacy available to it to express that will. It can, for example, direct its legislative representatives in Washington to make the people's position known, rename streets or buildings, or order the posting of the declaration in public buildings. . . ." (67 Cal.2d 325, at p. 329.)

However, unlike the situation in the Farley case, supra, the avenues of advocacy available to the Board in the instant case are narrowly circumscribed by other provisions of the Charter. The management of the Police Department is placed in the Police Commission (§3.530) and, except for the purpose of inquiry, the Board of Supervisors is precluded from dictating, suggesting or interfering with administrative recommendations or actions of said Commission. (§2.401.)



Mr. Robert J. Dolan

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July 5, 1972

While it does not appear from the foregoing that the Board could, by ordinance, effectively accomplish its apparent desire that the Police Commission reconsider its decision to close the stations, the Board is not completely without remedy. Among the "avenues of advocacy" available to the Board is its power to submit proposed charter amendments to the voters. Thus the Board, if it so desired, could order the submission of a proposed charter amendment requiring the continuation of district stations in the operation of the Police Department, including the reactivation of the stations recently closed, tempered, perhaps, by language providing for the closing, relocation or consolidation of such district stations upon approval of the Board of Supervisors.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





July 5, 1972

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Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Retroactive Salary Rights  
of Employee Appointed to  
Limited Tenure Class

Gentlemen:

This is in reply to your letter of June 29, 1972, concerning whether Miss Claire M. Casey, who was appointed to a limited tenure 3618 Library Technical Assistant II on October 27, 1969, is entitled to receive retroactive salary in that class to May 19, 1969.

The facts as outlined in your staff reports are as follows: Miss Claire Casey, a permanent 1446 Senior Clerk Stenographer, had been serving in that position at the Library since 1962. By action of the Civil Service Commission on May 19, 1969, it ruled that the position occupied by Miss Casey should be reclassified to a 3618 Library Technical Assistant II when it became vacant. Miss Casey was denied status rights to the new position because the salary differential between her position of 1446 Senior Clerk Stenographer and the position 3618 Library Technical Assistant II was greater than 5 per cent. (See Rule 24A, §3d(5), Rules of the Civil Service Commission.)

Miss Casey's 1446 position was subsequently resurveyed by the civil service staff with the view of reclassifying it to make the position more consistent with the duties performed by her. As a result of the classification survey, the staff recommended that Miss Casey's position be reallocated to a new class entitled 3617 Library Technical Services Supervising Clerk and that Miss Casey be granted status rights to the new class because the salary differential between the 1446 class and the new class would be less than 5 per cent. The Commission, on October 27, 1969, amended the staff recommendation by reallocating Miss Casey's position to a 3618 Library Technical Assistant II and gave Miss Casey a limited tenure appointment to the 3618 position.

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Civil Service Commission

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July 5, 1972

The Commission on May 19, 1969, ordered that the 1446 position occupied by Miss Casey be flagged for reallocation to 3618 Library Technical Assistant II when vacant but it did not reclassify the position until October 27, 1969. Miss Casey's limited tenure appointment to the reclassified position was effective October 27, 1969, and she is entitled to the salary of that position only from the effective date of her appointment thereto. Prior to October 27, 1969, Miss Casey was properly occupying a 1446 Senior Clerk Stenographer position which had been merely flagged for reallocation when it became vacant. There is no authority to pay Miss Casey retro-active salary for the period May 19, 1969, to October 27, 1969, because her 1446 position was not reallocated to a 3618 Library Technical Assistant II until October 27, 1969.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



July 7, 1972

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Mr. James K. Carr  
Director of Airports  
San Francisco International Airport  
San Francisco, California 94128

Subject: Airport Head Tax--  
State Preemption of Field

Dear Mr. Carr:

This is in reply to your request for an opinion as to whether the State of California could preempt the right to impose an airport head tax and thereby prevent cities (airport owners) from successfully imposing such a tax.

In your letter you state that (1) there is pending Congressional legislation which would prohibit states and local subdivisions thereof from levying or collecting a tax, fee, or other charge, directly or indirectly, on the carriage of persons in air transportation (S 3611 and HR 2337); and that (2) there appears to be some intent on the part of the State Department of Aeronautics to preempt the right to impose a head tax should the Congress fail to act.

Where "municipal affairs" are concerned, the State Constitution gives authority to local governments to make and enforce laws and regulations subject only to the provisions of their charters (Art. XI, §5(a)). As to such matters, local regulations are superior to the provisions of a state statute if there is a conflict between the two (Pipoly v. Benson, 20 C.2d 366, 369).

As to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation (the preemption doctrine). Bishop v. City of San Jose, 1 Cal.3d 56, 61-62.





Mr. James K. Carr

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July 7, 1972

The phrase "municipal affair" is a term of art. Its meaning as used in the Constitution must be sought in the decisions of the courts of this state. The courts have repeatedly declared that a matter is not a "municipal affair" unless it is of strictly local interest. Any doubt is to be resolved in favor of the state regulatory power (Trans World Airlines v. City and County of San Francisco, 228 F.2d 473, 475).

"The airport is not strictly a local affair. It is part of a global system of air transportation. Its value stems from the fact that it links the San Francisco area with other areas served by airports. It directly serves not only the City of San Francisco but all neighboring and outlying communities. Federal and State authorities regulate charges for common carrier air traffic" (Trans World Airlines v. City and County of San Francisco, *supra*, at p. 476).

Based on the foregoing, it is my opinion that the operation of an airport is a matter of statewide concern. Accordingly, the legislature has the power to preempt the field, including the imposition of a head tax on airline passengers, to the exclusion of local regulation.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION  
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July 12, 1972

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Mr. Thomas C. Scanlon, Treasurer  
City and County of San Francisco  
110 City Hall  
San Francisco, California 94102

Subject: People vs. M. R. Las Vegas, Inc., et al.  
Superior Court No. 594468

Dear Mr. Scanlon:

On June 26, 1972, I wrote to you concerning the stipulated judgment in the above matter and advised that, if the requirements of Penal Code Sections 1420, 1421 and 1422 were met, the City and County could retain the moneys remaining after all valid claims had been paid at the present time rather than wait the ten-year period set forth in Government Code Section 50050.

Mr. Julian D. Rhine of the District Attorney's Office subsequently informed me that the conditions set forth in the above Penal Code sections were not met and, further, that your main consideration was the distribution of the funds to the claimants rather than to the City and County of San Francisco.

Accordingly, the copy of the notice to creditors was again reviewed. The notice appears valid and may be published with one correction; viz., the provision that upon 30 days from the date the notice is published, the unclaimed moneys shall be paid into the general fund of the City and County of San Francisco should be amended to provide that, if said funds are not claimed after publication of the notice, the money shall be held by the Treasurer of the City and County of San Francisco.

Any moneys unclaimed after this period would need to be held as provided by Government Code Section 50050; i.e., ten years will have to elapse from the time the funds were first deposited in the Treasury before the moneys can be considered to be the property of the City and County of San Francisco.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney





July 14, 1972

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Donald M. Scott, Chief  
San Francisco Police Department  
850 Bryant Street  
San Francisco, California 94103

Subject: Juvenile Court Order Relating to  
Release of Information Regarding  
Juveniles by Law Enforcement Agencies  
Your File No. L-1670

Dear Chief Scott:

Pursuant to your request, I have reviewed the order currently being used by Judge Francis W. Mayer of the Juvenile Court, together with the Attorney General's Opinion No. CR 71-2.

The Attorney General is quite right that the T.N.G. case is limited to instances where detention of a minor results in his subsequent release without the filing of a petition with the Juvenile Court.

However, it appears that Judge Mayer is concerned not only with those minors who fall within that category, but is also concerned with the overall ramifications of preserving the intended confidentiality of juvenile records and also providing a record for necessary follow-up at such time as a minor may petition the Juvenile Court for sealing of his records after he has attained adulthood. In this regard, it seems obvious that the court is endeavoring to keep track of files in order to be able to properly effectuate a sealing order, not only as provided in the T.N.G. case but as provided in the State Code sections which were in existence prior to the decision in T.N.G. (Welf. and Inst. Code §§ 625, 676, 781 and 827).

Accordingly, I would recommend that you follow the provisions set forth in Judge Mayer's order.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



July 19, 1972

Mr. Bernard A. Orsi  
General Manager, Personnel  
Civil Service Commission  
151 City Hall  
San Francisco, California 94102

Subject: Employment by the City of a Member  
of the Police Department as a  
Consultant in Test Preparation

Dear Mr. Orsi:

This is in response to your request dated July 12, 1972, for my opinion whether a member of the police department who is a Ph.D. candidate in educational psychology at Stanford University can be retained by the city and county as a consultant to assist in developing an examination for the police department. The costs of retaining a consultant in preparing the examination will be paid by the Economic Opportunity Council of San Francisco. You state that the police department member will perform consulting duties over and above those of his normal work classification and will be working after hours and on weekends.

Section 8.400(f) of the Charter provides:

"The salary, wage or other compensation fixed for each officer and employee in, or as provided by this charter, shall be in full compensation for all services rendered, and every officer and employee shall pay all fees and other moneys received by him, in the course of his office or employment, into the city and county treasury."

This section requires that the salary provided by Charter for the police department member shall be in full compensation for all services rendered by him as a police officer. The additional work performed by the subject member as a test consultant is not a part of his regular duties as a police officer and will not be performed in the course of his office or employment as a

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Mr. Bernard A. Orsi

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July 19, 1972

police officer. Therefore, the compensation received by him for services as a test consultant is not additional compensation for services rendered by him as a police officer and does not violate the provisions of Section 8.400 of the Charter.

The consultant retained by the city and county to develop an examination for the police department will be paid by the Economic Opportunity Council of San Francisco and he will be performing expert, professional, temporary services. Such consultant would be, therefore, exempt from the civil service provisions of the Charter (see §8.300, Charter). Thus, there would be no objection that the police department member retained as a consultant would be holding more than one position in the city and county service.

Section 8.105(b) of the Charter provides in part:

"No supervisor and no officer or employee of the city and county shall engage in any activity, employment or business or professional work or enterprise which is inconsistent, incompatible, or in conflict with his duties as a supervisor or officer or employee of the city and county . . ."

The police department member will act as a consultant in the development of a test for applicants to the police department. The professional work involved in the preparation of an examination does not appear to be inconsistent, incompatible or in conflict with his duties as a police officer.

The police commission is given authority under Section 8.105(c) of the Charter to prescribe and enforce such reasonable rules and regulations as may be necessary to restrict the activities, employments and enterprises of its members. The police department member would, therefore, have to apply to the police commission for permission to engage in the proposed consulting duties. (See Rule 2.29, Rules and Procedures, San Francisco Police Department.)

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney



10-10-1944

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10-10-1944

The following information was received from the  
Bureau of Investigation on 10-10-1944 regarding the  
activities of the German Government in the United States  
and the activities of the German Government in the United States  
and the activities of the German Government in the United States.

The following information was received from the  
Bureau of Investigation on 10-10-1944 regarding the  
activities of the German Government in the United States  
and the activities of the German Government in the United States  
and the activities of the German Government in the United States.

Section 101(a) of the Foreign Corrupt Practices Act

The following information was received from the  
Bureau of Investigation on 10-10-1944 regarding the  
activities of the German Government in the United States  
and the activities of the German Government in the United States  
and the activities of the German Government in the United States.

The following information was received from the  
Bureau of Investigation on 10-10-1944 regarding the  
activities of the German Government in the United States  
and the activities of the German Government in the United States  
and the activities of the German Government in the United States.

The following information was received from the  
Bureau of Investigation on 10-10-1944 regarding the  
activities of the German Government in the United States  
and the activities of the German Government in the United States  
and the activities of the German Government in the United States.

Very truly yours,

Wm. A. Rorer  
Attorney

July 19, 1972

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Mr. Bruno B. Fardin  
Clerk of the Municipal Court  
301 City Hall  
San Francisco, California 94102

Subject: Residential Requirements for  
Municipal Court Deputy Clerks

Dear Mr. Fardin:

I have reviewed your request for an opinion regarding the desire of three of your clerks to reside outside the City and County of San Francisco.

This question was reviewed in a prior opinion of this office, No. 66-6, dated April 18, 1966. That opinion explained that though the state legislature could set residency requirements for municipal court clerks, none had been set forth in Section 71140.1 of the Government Code, insofar as the City and County of San Francisco was concerned. Therefore, the opinion concluded that in the absence of state legislation, the City and County could impose its own residency requirements. This opinion was reaffirmed in relation to residency requirements in Opinion Letter No. 71-32 for the clerks of the municipal court of San Francisco.

Since that time the legislature has amended Section 71140.1 so as to provide for residence of clerks of the municipal court of the City and County of San Francisco. As you mentioned in your letter, that section now reads:

"The attaches of a municipal court may reside in counties adjoining the county in which they are employed."

You are therefore advised that pursuant to the amended version of Section 71140.1 of the Government Code, your deputy clerks may reside in counties adjoining the City and County of San Francisco.

Very truly yours,

THOMAS M. O'CONNOR  
City Attorney

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